

SPECIAL BULLETIN

November 21, 2008

DOL Issues Final FMLA Regulations Addressing Issues Such as Intermittent Leave, Notice Requirements, Medical Certification, and the New Military-Related Leaves.

On November 17, 2008, the U.S. Department of Labor published final regulations making numerous changes to its existing regulations which implement the Family and Medical Leave Act (FMLA). These new regulations go into effect on January 16, 2009 – 60 days after the publication date. The regulations have made some significant changes, such as the amount of time employers have to issue eligibility and designation notices. The regulations also provide clarification regarding a variety of issues, such as how to count holidays in cases where an employee takes leave in increments of less than a full workweek, obtaining clarification regarding medical certification, and transfers of employees who take unforeseeable intermittent leave. In addition, the regulations implement the new military family leave provisions under the National Defense Authorization Act (NDAA), which was added to the FMLA in January 2008.

A full copy of the final regulations, which are 201 pages, can be found at:
<http://www.dol.gov/federalregister/PdfDisplay.aspx?DocId=21763>

Here is a summary of the regulations' highlights:

- ◆ Clarifying that employment prior to a break in service can and often should be credited in determining FMLA eligibility
- ◆ Clarifying when medical visits must occur when a person has a serious health condition
- ◆ Defining the term "periodic visit" for purposes of a serious health condition
- ◆ Stating that compensatory time off may be substituted for FMLA leave
- ◆ Providing that employers may electronically post their general notices
- ◆ Allowing employers five days, instead of two days, to provide eligibility and designation notices
- ◆ Clarifying that only one designation notice is required for each FMLA-qualifying reason per leave year
- ◆ Stating that employees seeking additional leave for a condition for which FMLA leave was previously provided must explicitly indicate they need leave for the same condition
- ◆ Setting forth a procedure for curing an insufficient medical certification
- ◆ Specifying which non-health care providers employers can use to obtain clarification of a medical certification
- ◆ Allowing employers to seek re-certification at least every six months
- ◆ Providing new and revised sample documents (e.g. certifications)
- ◆ Defining the term "qualifying exigency" added by the NDAA
- ◆ Outlining parameters of 26 week military caregiver leave under the NDAA

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Modifications To Existing FMLA Provisions

Eligibility Requirements

- ◆ For FMLA eligibility, an employee must have been employed by the employer for at least 12 months and have at least 1,250 hours of service in the 12-month period preceding the leave. Under the final regulations, an employer generally does not need to count any employment prior to a continuous break in service of seven years or more. However, the employer must count employment prior to a continuous break in service of seven years or more if: (1) the employee's break in service is due to the fulfillment of his or her National Guard or Reserve military service obligation, or (2) a written agreement, including a collective bargaining agreement, exists concerning the employer's intention to rehire the employee after the break in service. This new regulation clarifies that, with certain limitations, employers must consider prior employment in determining eligibility for FMLA leave. The regulation also codifies the Uniformed Services Employment and Reemployment Rights Act requirement that returning service members receive the rights and benefits they would have had if they had been continuously employed with respect to FMLA leave.
- ◆ The final regulations also clarify that an employee may attain FMLA eligibility while out on a block of leave when the employee satisfies the requirement for 12 months of employment. It was previously unclear as to whether someone could become eligible for FMLA leave while out on leave.

FMLA Terms Re-Defined or Clarified

- ◆ Under the final regulations, an individual has a "**serious health condition**" based on a period of incapacity of more than three consecutive, *full* calendar days if the employee or family member is treated two or more times by a health care provider *within 30 days* from the first day of incapacity, absent extenuating circumstances. And the first medical visit must take place within seven days of the first day of incapacity. Previously, it was unclear as to whether the days of incapacity could be partial days of incapacity. Similarly, under the old regulations, the two visit requirement was open-ended without any parameters.
- ◆ To qualify as a serious health condition based on more than three consecutive, *full* calendar days of incapacity and one doctor's visit, plus a "regimen of continuing treatment," the one and only doctor visit must take place within seven days of the first day of incapacity. Under the previous regulations, it was uncertain as to whether the days of incapacity could be partial days of incapacity. In addition, there was no guidance as to when the medical visit had to occur.
- ◆ Under the definition of a "chronic serious health condition," the term "**periodic visit**" means visiting a health care provider at least twice a year for the same condition. For the first time, the new regulations provide a definition for "periodic visit."
- ◆ Physician assistants are added to the definition of a "health care provider."

Pregnancy or Birth Leave

- ◆ The final regulations clarify that, as to pregnancy or birth leave, a husband is entitled to FMLA leave if he is needed to care for his wife who is incapacitated due to her pregnancy provided she has a serious health condition. The new regulations summarize a husband's right to take leave when needed to care for his pregnant spouse due to her serious health condition but emphasize that this right is not available to a boyfriend or fiancé who is the father of the unborn child (although a boyfriend or fiancé may be entitled to bonding leave).

Intermittent Leave

- ◆ The regulations now provide that employees who take intermittent leave for planned medical treatment must make a "reasonable effort," and not simply an "attempt" (as previously provided), to schedule such treatment so as not to disrupt unduly the employer's operations.
- ◆ The regulations already allowed for an employer to transfer an employee in cases of intermittent or reduced schedule leave that is foreseeable based on planned medical treatment. Although employees may

need to take intermittent leave regularly, frequently, and predictably (even if unforeseeably), the DOL expressly declined to permit transfers to an alternative position for those taking unscheduled or unforeseeable intermittent leave.

- ◆ Employers must track intermittent or reduced schedule leave using an increment no greater than the shortest period of time the employer uses to account for use of other forms of leave provided it's not greater than an hour. However, employers are not required to account for FMLA leave in increments of six minutes or even 15 minutes simply because their payroll systems are capable of doing so. In other words, although an employer's payroll system tracks time in smaller increments than an hour, if an employer tracks leave time on an hour-by-hour basis, the employer must track FMLA leave on an hour-by-hour basis as well.

Substituting Paid Leave for FMLA Leave

- ◆ Employers may apply their normal policies for taking paid leave when an employee substitutes paid leave for unpaid FMLA leave (i.e. the leaves run concurrently) regardless of the type of paid leave substituted. Prior to these new regulations, employers could only restrict the substitution of paid sick or medical leave, but not the substitution of paid vacation or personal leave.
- ◆ An employer must notify the employee of any additional requirements for the use of paid leave (e.g., the leave must be taken in full-day increments, assuming leave is not taken intermittently, or requires completion of a request form).
- ◆ The old regulations stated that substitution of paid leave does not apply where the employee is receiving paid disability leave. The new regulations provide that, although neither the employer nor the employee may require the substitution of paid leave in such circumstances, they may voluntarily agree to supplement the disability plan benefits and/or workers' compensation benefits with paid leave during an FMLA leave.
- ◆ Compensatory time off accrued by a public agency employee under the Fair Labor Standards Act may be substituted for unpaid FMLA leave. For 13 years previously, the FMLA regulations had provided that an employer could not require the use of compensatory time off with unpaid FMLA leave.

Light Duty Assignments

- ◆ The new regulations clarify that employees who voluntarily accept a light duty assignment *do not waive* their rights to reinstatement to their original position. The employee's right to restoration is held in abeyance during the light duty assignment (for up to one year from the date the leave commences).

Employer General Notice Requirements

- ◆ The new regulations provide that employers may satisfy their posting requirements through an electronic posting of the general notice as long as all employees and applicants for employment have access to the information. Consequently, if the employer posts such information on an intranet that is not accessible to applicants, additional posting accessible to applicants would be necessary.
- ◆ If an employer does not have employee handbooks or other written materials concerning benefits and leave that are distributed to all employees, the general notice must be provided to each employee when the employee is hired.

Eligibility Notice Requirements

- ◆ When an employer receives a request for FMLA leave or acquires knowledge that an employee's leave may be for an FMLA-qualifying reason, absent extenuating circumstances, the employer now has five business days — instead of two business days — to notify the employee of the employee's eligibility to take FMLA leave. If the employee is not eligible for FMLA leave, the notice must state at least one reason why the employee is not eligible. This is a significant change.

- ◆ To simplify notice requirements, employers must now provide employees with the rights and responsibilities notice at the same time they provide the eligibility notice. The eligibility notice should include the method used for establishing the 12 month period for FMLA entitlement or, for military caregiver leave, the start date of the "single 12-month period."

Designation Notice Requirements

- ◆ Absent extenuating circumstances, an employer has five business days, instead of two days, from when the employer has sufficient information to make such a determination to give the employee the designation notice. If the leave is not designated FMLA leave, the notice must state the reason why the leave was not designated.
- ◆ The designation notice now must inform the employee of the number of hours, days, or weeks that are designated as FMLA leave if possible.
- ◆ To ease employers' administrative burdens, the new regulations clarify that only one designation notice is required for each FMLA-qualifying reason per leave year, regardless of whether the leave is taken as a continuous block of leave or on an intermittent or reduced leave schedule basis.
- ◆ Employers must notify employees if the information in the designation notice changes. For example, if an employee exhausts his or her FMLA leave entitlement and the leave will no longer be designated as FMLA leave.
- ◆ The final rules eliminated the "provisional designation" concept because provisionally designating leave as FMLA leave could potentially mislead people into thinking that their leave is protected prior to the actual designation, especially in cases where the leave does not eventually qualify for FMLA protection.
- ◆ To encourage communication between employers and employees, the final regulations contain a new requirement that, if there is a dispute as to whether leave qualifies as FMLA leave, it should be resolved through discussions between the employee and the employer. And such discussions and the decision must be documented.

Employee Notice Requirements

- ◆ If an employee does not ask for FMLA leave at least 30 days in advance, the employer may ask the employee why it was not possible to give 30 days notice of his or her need for FMLA leave. The FMLA requires that, if an employee cannot give at least 30 days advance notice of his or her need for foreseeable leave, the notice must be provided "as soon as practicable." The new requirement that employees explain why 30 days notice was not possible will help employers determine whether the employee provided notice as soon as practicable.
- ◆ An employee seeking additional leave due to a condition for which the employer has previously provided FMLA leave must inform the employer of this fact. "Calling in sick" for subsequent absences, by itself, will not trigger FMLA protection. Employees need to be informed of this requirement.
- ◆ Instead of providing notice of unforeseeable leave within two working days, an employee must now provide notice of his or her need for leave "as soon as practicable" and comply with the employer's usual procedures for calling in and requesting leave, except where unusual circumstances exist.
- ◆ If an employee fails to comply with the notice requirements, the employer may delay or deny FMLA coverage. Under the previous regulations, employers could discipline employees, but not delay or deny coverage.
- ◆ The same requirements for providing notice for foreseeable leave that apply to existing FMLA leave are extended to military caregiver leave, but the 30-day advance notice requirement does not apply to qualifying exigency leave.

Medical Certifications

- ◆ The final regulations explicitly provide that, where an employee's serious health condition may also be a disability for purposes of the Americans with Disabilities Act (ADA), paid leave or workers' compensation benefits, the employer may follow the ADA, paid leave or workers' compensation program procedures for requesting medical information without violating the FMLA. Employers may use this

information in determining the employee's entitlement to FMLA leave. This is a significant change from the limited medical inquiries employers were permitted to make under the previous regulations.

- ◆ To stay consistent with other revisions, the final rules increased the time frame in which an employer should request medical certification from two to five business days after notice of the need for FMLA leave. Meanwhile, the general 15-day time period for providing a requested certification applies to all cases, including where the employee provides notice of the need for leave 30 days in advance.
- ◆ The final rules define "incomplete" and "insufficient" certifications and set forth a procedure for curing an incomplete or insufficient certification that requires an employer to notify the employee in writing as to what additional information is necessary for the medical certification and gives the employee seven calendar days to provide the additional information.
- ◆ If an employee cannot meet the 15-day time frame to provide medical certification despite his or her diligent, good faith efforts, the employer must provide the employee additional time to supply the certification. In a split from the previous regulations, the employer may not immediately deny or delay FMLA coverage if there is sufficient reason for the delay.
- ◆ The FMLA regulations used to state that if a less stringent medical certification standard applies under the employer's sick leave plan, only the lesser standards may be required when the employee substitutes any form of paid leave for FMLA leave. Under the new regulations, an employer may require annual medical certifications in those cases in which a serious health condition extends beyond a single leave year.
- ◆ Employers are strongly encouraged, but not required, to provide a list of essential functions when they require a medical certification.
- ◆ To obtain clarification or authentication of a FMLA medical certification, the employer representative contacting the employee's health care provider must be either a health care practitioner, a human resources professional, a leave administrator, or a management official, but in no case may the employer representative be the employee's direct supervisor. Communication between employers and employees' HIPAA-covered health care providers for purposes of clarification of FMLA certifications must comply with the requirements of the HIPAA Privacy Rule. The employee is not required to permit his or her health care provider to communicate with the employer, but if such contact is not permitted and the employee does not otherwise clarify an unclear certification, the employer may deny the designation of FMLA leave.
- ◆ The DOL clarified that, if an employee fails to provide medical certification in a timely manner, employers can "deny" FMLA leave until the medical certification is provided unless there is sufficient reason for the delay.

Medical Re-certification

- ◆ Under the previous regulations, where a certification specified a minimum duration of incapacity of more than 30 days, an employer could not request re-certification until the specified minimum duration had passed. The new regulations clarify that the 30 days are based on the duration of the condition, not the period of incapacity.
- ◆ In all cases, the employer may seek re-certification every six months in connection with an absence, even if the medical certification indicates that the employee will need intermittent or reduced schedule leave for a period in excess of six months (e.g., for a lifetime condition). Under the previous regulations, when an employee had a long-term or lifetime condition, it was unclear if the employer could request re-certification every 30 days or never request re-certification. This is one of the most significant changes to the regulations because employees will not be able to submit lifetime certifications.

Fitness-for-Duty

- ◆ If an employer will require the employee to provide a fitness-for-duty certification at the end of his or her FMLA leave, the employer must provide a list of the essential job functions to the employee with the designation notice. If the employee handbook or other written documents clearly provide that a fitness-for-duty certificate will be required, written notice is not required, but oral notice must be provided.

- ◆ The final regulations create a new provision allowing an employer to ask for fitness-for-duty certifications for intermittent leave up to once every 30 days if reasonable safety concerns exist regarding the employee's ability to perform his or her duties.
- ◆ An employer may not require that an employee submit to a medical exam by the employer's health care provider as a condition of returning to work. This change was addressed by a few cases in the past and is now part of the regulations. A medical examination at the employer's expense by an employer's health care provider may be required only after the employee has returned from FMLA leave and must be job-related and consistent with business necessity as required by the ADA. However, the employer cannot delay the employee's return to work while arranging for and having the employee undergo a medical examination.

How to Count Holidays for FMLA Leave

- ◆ To clear up ambiguity as to whether holidays should be counted against an employee's FMLA entitlement, the final regulations state that, if an employee needs less than a full week of FMLA leave, and a holiday falls within that partial week of leave, the hours that the employee does not work on the holiday cannot be counted against the employee's FMLA leave entitlement if the employee would not otherwise have been required to report for work on that day.

Anti-Discrimination Provisions

- ◆ As for attendance awards, an employer may deny perfect attendance bonuses or similar awards to employees who take FMLA leave, provided that the employees with non-FMLA absences are treated the same way.
- ◆ The regulations now explicitly prohibit retaliation against an employee who asserts his or her FMLA rights.

Waiver of FMLA Rights

- ◆ The prohibition against employees waiving their FMLA rights only applies to prospective FMLA rights and does not apply to settling past FMLA claims. This new regulation resolves a split in the courts regarding whether employees could settle or release FMLA claims based on past employer conduct.

Provisions Related to Military Related Leaves

Qualifying Exigency Leave Under the NDAA

The NDAA provides that eligible employees may take up to 12 weeks of FMLA leave for any qualifying exigency due to a spouse, son, daughter or parent of the employee being on active duty or being notified of an impending call to active duty status in support of a contingency operation. Qualifying exigency leave is available to employees who have a spouse, son, daughter, or parent called to active duty as part of the Reserve components and the National Guard, or a retired member of the Regular Armed Forces or Reserve. An employee whose family member is a member of the Regular Armed Forces is not entitled to qualifying exigency leave.

The final regulations set forth the seven general categories of qualifying exigencies:

1. **Short-notice deployment:** To address any issue that arises due to a covered military member being notified of an impending call or order to active duty seven or less calendar days prior to the date of deployment.
2. **Military events and related activities:** To attend any official ceremony, program, or event sponsored by the military and to attend family support and assistance programs and informational briefings sponsored or promoted by the military, military service organizations, or the American Red Cross that are related to the active duty or call to active duty status of a covered military member.

3. **Childcare and school activities:** To arrange childcare or attend certain school activities for a child of the covered military member, who is either under age 18, or age 18 or older and incapable of self-care. This leave may be taken to arrange for alternative childcare, to provide urgent, immediate, non-routine childcare, to enroll the child in a new school or day care facility, or to attend meetings with staff at a school or a day care facility (e.g. disciplinary meetings, parent-teacher conferences, meetings with school counselors).
 4. **Financial and legal arrangements:** To make or update financial or legal arrangements to address the covered military member's absence while on active duty or call to active duty status, such as preparing and executing financial and healthcare powers of attorney, transferring bank account signature authority, enrolling in the Defense Enrollment Eligibility Reporting System, obtaining military identification cards, or preparing or updating a will or living trust. The leave can also be used for acting as the military member's representative for purposes of obtaining, arranging, or appealing military service benefits while the covered military member is on active duty or call to active duty status, and for the 90 days after the termination of the covered military member's active duty status.
 5. **Counseling:** To attend counseling provided by someone other than a healthcare provider for oneself, for the covered military member, or for the child of the covered military member who is either under the age of 18 or age 18 or older and incapable of self-care, provided that the need for counseling arises from the active duty or call to active duty status of a covered military member.
 6. **Rest and recuperation:** To spend time with a covered military member who is on short-term, temporary rest and recuperation leave during the period of deployment. Eligible employees may take up to five days of leave for each instance of rest and recuperation.
 7. **Post-Deployment activities:** To attend arrival ceremonies, reintegration briefings and events, and any other official ceremony or program sponsored by the military for a period of 90 days following the termination of the covered military member's active duty and to address issues that arise from the death of a covered military member while on active duty status, such as meeting and recovering the body of the covered military member and making funeral arrangements.
 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 that the employer and employee agree that such leave shall qualify as an exigency, and agree to both the timing and duration of such leave.
- ◆ If an employee requests leave for a qualifying exigency, the employee must provide sufficient information that indicates that a family member is on active duty or call to active duty status, that the requested leave is for one of the qualifying exigencies listed in the regulations, and the anticipated duration of the absence.
 - ◆ For qualifying exigency leave, an employer may require an employee to provide a copy of the covered military member's active duty orders or other documentation issued by the military which indicates that the covered military member is on active duty (or has been notified of an impending call or order to active duty) in support of a contingency operation, and the dates of the covered military member's active duty service.

Military Caregiver Leave Under the NDAA

The NDAA amended the FMLA to allow an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember to take 26 workweeks of leave during a single 12-month period to care for the servicemember. An eligible employee may take FMLA leave to care for a covered servicemember with a serious injury or illness incurred in the line of duty on active duty for which the servicemember is (1) undergoing medical treatment, recuperation, or therapy; or (2) otherwise in outpatient status; or (3) otherwise on the temporary disability retired list. As with leave for other FMLA-qualifying reasons, an employee on military caregiver leave is entitled to paid health benefits as if the employee continued to work.

Who Is Entitled to Take Military Caregiver Leave

- ◆ The term "covered servicemember" includes current members of the Regular Armed Forces, current members of the National Guard or Reserves, and members of the Regular Armed Forces, the National Guard and the Reserves who are on the temporary disability retired list. Former members of the Regular Armed Forces, former members of the National Guard and Reserves, and members on the permanent disability retired list are not considered covered servicemembers.
- ◆ An employer may request that an employee seeking to take military caregiver leave obtain appropriate certification that a servicemember's serious injury or illness was incurred in the line of duty on active duty.
- ◆ For purposes of military caregiver leave, a "son or daughter of a covered servicemember" is the covered servicemember's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the covered servicemember stood *in loco parentis*, and who is of any age. This definition does not apply to leave taken for other FMLA-qualifying reasons.
- ◆ A servicemember's "next of kin" is the servicemember's nearest blood relative, other than the covered servicemember's spouse, parent, son, or daughter, in the following order of priority: blood relatives who have been granted legal custody of the servicemember by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered servicemember has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under FMLA, in which case the designated individual shall be considered the covered servicemember's next of kin.
- ◆ When an employer wants proof of an individual's status as a covered servicemember's next of kin, the employee must provide reasonable documentation of the familial relationship. If the servicemember has not designated a next of kin, a simple statement from the employee outlining the employee's familial relationship to the servicemember will suffice.
- ◆ When leave is taken to care for a covered servicemember with a serious injury or illness, an employer may require an employee to support his or her request for leave with a sufficient certification from one of the specified, authorized health care providers. The certification may include: (1) Whether the service member has incurred a serious injury or illness; (2) whether the injury or illness may render the service member medically unfit to perform the duties of the member's office, grade, rank, or rating; (3) whether the injury or illness was incurred by the member in the line of duty on active duty; and (4) whether the servicemember is undergoing medical treatment, recuperation, or therapy, is otherwise on outpatient status, or is otherwise on the temporary disability retired list. The certification should also include 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: (1) the probable duration of the injury or illness; (2) frequency and duration of leave required; (3) if leave is requested on an intermittent or reduced schedule basis, an estimate of the frequency and duration of such leave; and (4) the family relationship of the eligible employee to the covered servicemember.
- ◆ The DOL has provided an optional form for employees' use in obtaining certification.

Circumstances Under Which Military Caregiver Leave May Be Taken

- ◆ The 26-workweek entitlement is a one-time entitlement applied on a per-servicemember, per-injury basis, meaning that an eligible employee may take 26 workweek of leave to care for one covered servicemember in a "single 12-month period."
- ◆ Unlike FMLA leave for other qualifying reasons, military caregiver leave is not a yearly entitlement that renews each year. Thus, if an eligible employee is caring for a covered servicemember whose serious injury or illness extends beyond the employee's 26-workweek leave entitlement, the employee is not eligible for an additional 26-workweek entitlement to continue to care for the covered servicemember in the next year defined by the employer.
- ◆ Notably, even after an employee has exhausted his or her military caregiver leave entitlement, the employee may be entitled to use his or her normal 12-week FMLA leave entitlement to provide care to the servicemember due to the same injury or illness. In other words, employers are prohibited from

counting leave that qualifies for both military caregiver leave and leave for other qualifying reasons concurrently. Consequently, although an employee may not satisfy the 1,250 hour eligibility requirement when he or she uses the FMLA leave to care for a family member with a serious health condition, he or she will be eligible for the leave if he or she satisfied the eligibility requirements when he or she commenced the military caretaker leave for the same condition.

- ◆ The "single 12-month period" for military caregiver leave begins on the first day the eligible employee takes the leave and ends 12 months after that date, regardless of the method used by the employer to determine the employee's 12 workweek leave entitlement for other FMLA-qualifying reasons.
- ◆ While the "single 12-month period" for military caregiver leave begins on the first day the employee takes the leave, an employer may establish the 12-month period for other FMLA-qualifying leave. This means that an employer may need to track an employee under two different 12-month leave periods. The regulations provide a detailed example of how employers should reconcile the use of leave to care for a covered servicemember with other FMLA leave if two different leave years are used.
- ◆ An eligible employee is entitled to a combined total of 26 workweeks of military caregiver leave and leave for any other FMLA-qualifying reason in a "single 12-month period," provided that the employee may not take more than 12 workweeks of leave for any other FMLA-qualifying reason.
- ◆ The same designation rules apply to leave taken to care for a covered servicemember and leave taken for other FMLA-qualifying reasons. Consequently, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee. Rules regarding retroactive designations also apply to military caregiver leave.
- ◆ In the case of leave that qualifies as both military caregiver leave and leave to care for a family member with a serious health condition, the employer must designate such leave as military caregiver leave first.

Provisions Specifically for School Employees

- ◆ Currently, when an instructional employee requests FMLA leave intermittently or on a reduced leave schedule basis for foreseeable planned medical treatment of a covered servicemember and who, as a result, will be on leave for greater than 20 percent of the total number of working days during the period of leave, the employee must choose to either (1) take leave for a period or periods of particular duration; or (2) transfer temporarily to an available alternative position with equivalent pay and benefits that better accommodates recurring periods of leave. The final regulations extend this limitation to military caretaker leave, but not to qualified exigency leave.
- ◆ Under the current regulations, if an instructional employee begins leave for a purpose other than the employee's own serious health condition during the five-week period before the end of the term, the employer may require the employee to continue taking leave until the end of the term if the leave will last more than two weeks and the employee would return to work during the two-week period before the end of the term. Similarly, an employer may require an instructional employee to continue taking leave until the end of the term if the employee begins leave that will last more than five working days for a purpose other than the employee's own serious health condition during the three-week period before the end of the term. The final regulations extend the limitations to leave taken to care for a covered servicemember, but not leave taken because of a qualifying exigency.

New and Revised Sample Documents

The final regulations include seven new and revised sample documents as appendices.

- ◆ WH-380E: New Certification of Health Care Provider for Employee's Serious Health Condition
- ◆ WH-380F: New Certification of Health Care Provider for Family Member's Serious Health Condition
- ◆ WH Publication 1420: Notice to Employee of Rights Under FMLA
- ◆ WH-381: Notice of Eligibility and Rights and Responsibilities
- ◆ WH-382: Designation Notice
- ◆ WH-384: Certification of Qualifying Exigency for Military Family Leave
- ◆ WH-385: Certification of Serious Injury or Illness of Covered Servicemember for Military Family Leave

In light of the final regulations' additions and revisions, our clients will need to update their FMLA/CFRA policies and practices. Remember, provisions of the California Family Rights Act (the "CFRA," which is the State of California family and medical leave law) are not changed by these regulations. However, provisions of the CFRA which provide greater rights to employees must still be followed. Employers with any questions regarding how to implement the new FMLA regulations should contact any one of LCW's offices.

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FMLA/CFRA Training

Save the Date!

Liebert Cassidy Whitmore will be conducting FMLA/CFRA training regarding the new regulations which will take effect on January 16, 2009. The training will not only discuss the new FMLA regulations, but will also address how the new regulations relate to the current regulations as well as provisions of the CFRA. As a California employer, you need to comply with both the FMLA and CFRA. This training will discuss how your obligations as California employers have changed given the provisions of both laws. Please see the dates below for training in your area.

January 13, 2009
San Diego

January 14, 2009
San Francisco

January 15, 2009
Los Angeles

January 15, 2009
Fresno

More information will be posted on our website at www.lcwlegal.com as it becomes available.

If you have questions about this issue, please contact our Los Angeles, Fresno or San Francisco office.