Labor and Employment Law Information Memo

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DEPARTMENT OF LABOR PUBLISHES LONG-AWAITED REVISED FAMILY AND MEDICAL LEAVE ACT REGULATIONS

The Family and Medical Leave Act ("FMLA"), which became law in 1993, requires employers to provide eligible employees with up to 12 weeks of unpaid, job-protected leave in specified circumstances:

- leave to care for a newborn child;
- leave to adopt a child or placement of a child in foster care;
- leave to care for a son, daughter, spouse or parent with a serious health condition; or
- leave for the employee's own serious health condition.

Following passage, the United States Department of Labor ("DOL") promulgated regulatory guidance on the FMLA. For the past fifteen years, employers have used their best efforts to navigate the stringent notice and communication obligations, as well as other requirements, of the FMLA.

On November 17, 2008, the DOL issued long-awaited, revised FMLA regulatory guidance. This guidance, as published in the *Federal Register*, constitutes 200+ pages of material and includes extensive revisions to the FMLA regulations, 29 CFR Part 825. The revised regulations are intended to clarify the rights and responsibilities of both employers and employees under the FMLA, as well as streamline the necessary communications between employers, employees, and health care providers. The DOL's final rule also contains its first administrative direction concerning the January 2008 legislation, which expanded the FMLA to provide coverage for military family members.

Highlights of the DOL's revised regulations, which will take effect on January 16, 2009, are set forth as follows.

Military Family Leave

Enacted in January 2008, the National Defense Authorization Act ("NDAA") amended the FMLA to provide two new leave entitlements – military caregiver leave and qualifying exigency leave.

Military Caregiver Leave

The NDAA provides that eligible employees who are family members of covered service members may take up to 26 work weeks of leave in a single 12-month period to care for a service member who has a serious illness or injury that was incurred in the line of duty while on active duty. This 26-week leave period is a unique provision that is more generous than the 12 weeks provided for other leaves covered by the FMLA. In addition, this provision encompasses a definition of "family" that is broader than "son, daughter, spouse or parent."

The provision applies to "next of kin" which the DOL's final rule defines as the nearest blood relative (other than a spouse, parent, son, or daughter) to include the following in order of priority: a relative who has been granted legal custody of the covered service member, brothers, sisters, grandparents, aunts, uncles, and first cousins, or a specific blood relative who has been designated as a service member's caregiver. When no such designation is made, and there are multiple family members with the same level of relationship to the covered service member, all such family members are considered to be next

of kin and may take FMLA leave to provide care to the covered service member, either consecutively or simultaneously.

Qualifying Exigency Leave

The NDAA also provides an eligible employee, who has a covered family member serving in either the National Guard or the Reserves, with up to 12 work weeks of FMLA job-protected leave for "any qualifying exigency" that arises while the covered family member is on active duty or called to active duty status in support of a contingency operation. The regulations identify 8 categories for which an eligible employee may use FMLA leave under this qualifying exigency provision:

- Short-notice deployment: a covered military member is notified of an impending call or order to active duty 7 or less days before deployment;
- Military events & related activities: (a) to attend any official ceremony, program, or event sponsored by the military that is related to active duty; or (b) to attend family support or assistance programs or informational briefings sponsored by the military;
- Childcare & school activities: (a) to arrange for childcare when active duty necessitates a change in childcare arrangements; (b) to provide childcare on an urgent basis when the urgency arises from active duty status; (c) to enroll in a new school or daycare because of active duty; or (d) to attend meetings at a school or daycare for a child of a covered service member due to circumstances arising from active duty;
- Financial & legal arrangements: (a) to make or update financial arrangements to address a covered military member's absence while on active duty; or (b) to act as a covered military member's representative before a federal, state, or local agency to obtain or arrange military service benefits while a covered service member is on active duty;
- Counseling: to attend counseling provided by someone other than a health care provider for oneself, the covered military member, or a child of a covered service member if the need for counseling arises from active duty or the call to active duty;
- Rest & recuperation: to spend up to 5 days of leave with a covered military member who is on short-term, temporary, rest and recuperation leave;
- Post-deployment activities: (a) to attend arrival ceremonies, reintegration briefings and events, and other official ceremonies sponsored by the military for a period of 90 days after the termination of active duty status; or (b) to address issues that arise from the death of a covered military member while on active duty status; or
- Additional activities: a catch-all designed to address any other event that may arise out of active duty or a call to active duty status, provided that such leave is agreed upon by the employer and employee.

Serious Health Condition

Under the FMLA, an employee can qualify as having a serious health condition either with inpatient care or by receiving "continuing treatment." Continuing treatment, in turn, can be established in several different ways. One such way is if the employee can demonstrate more than 3 consecutive days of incapacity plus treatment. The current regulations identify two ways in which an employee can satisfy the 'treatment' prong of the incapacity plus treatment definition, including:

- treatment two or more times by a health care provider; or
- treatment by a health care provider which results in a regimen of continuing treatment.

An employee can also show the existence of a serious health condition through continuing treatment by establishing the existence of a "chronic serious health condition."

In its revised regulations, the DOL attempts to clarify these various definitions for the term "serious health condition."

1. For an employee to satisfy the 'treatment' prong of the incapacity plus treatment definition with 2 or more visits to a health care provider, the DOL's final rule specifically provides that: (a) the employee must have these 2 visits within 30 days of the beginning of the period of incapacity; and (b) the first visit must take place within 7 days of the first day of incapacity.
2. The DOL also provides in the revised regulations that an employee with more than 3 consecutive days of incapacity plus a continuing regimen of treatment must first visit a health care provider within 7 days of the first day of incapacity.
3. Finally, a "chronic serious health condition" requires periodic visits to a health care provider for treatment, although under current FMLA regulations, "periodic visit" is not defined. The DOL's final rule now provides that the term "periodic visit" constitutes 2 or more appointments with a health care provider over the course of one year.

Medical Certification Process

Content & Clarification

The revised regulations now account for the Health Insurance Portability and Accountability Act ("HIPAA") privacy rules and the effect HIPAA has had on employer communications with employee health care providers for FMLA purposes. In an effort to balance the HIPAA privacy rules with the frequent need to obtain additional information regarding an employee's serious health condition, DOL has clarified that the employer's representative who contacts an employee's health care provider must either be a health care provider, a human resources professional, a leave administrator, or a management official. Under no circumstances, however, can the employer representative be the employee's direct supervisor. The DOL's final rule also prohibits the employer representative from asking the health care provider for any information beyond that which is required on the FMLA medical certification form. Finally,

if the employer receives a medical certification form from the employee and determines that the form is incomplete or insufficient, the employer must notify the employee, in writing, specifying the additional information needed to complete the form and provide the employee with 7 days to cure the deficiency before denying the leave.

The DOL has updated Medical Certification Form WH-380, which now consists of separate forms for the employee and covered family members, and also includes the new military leave entitlements referenced above.

Timing

Under the revised regulations, employers will now have 5 business days, rather than 3, to require an employee to submit a medical certification form to support his or her FMLA leave request. The revised regulations also provide that when an employee's need for leave – either for the employee's own serious health condition or for the serious health condition of a family member – lasts beyond a single 12-month FMLA leave year, an employer may require the employee to submit a new medical certification form for each subsequent leave year.

Finally, under the current FMLA regulations, an employer may not require an employee to provide medical recertification more often than every 30 days and only in combination with an employee's absence, unless: (1) the employee requests an extension of leave; (2) circumstances have changed significantly; or (3) the employer receives information that casts doubt on the employee's reason for the absence. Additionally, if a minimum duration for the period of incapacity is specified, the employer may not request recertification until that period has expired. However, the revised FMLA regulations provide that in all cases in which the medical certification indicates that the duration of the condition will last for an extended period of time (*i.e.*, "indefinite," "lifetime," "unknown," etc.), an employer can request recertification every 6 months.

Fitness-for-Duty Certification

The DOL's final rule incorporates two changes to fitness-for-duty certifications:

- An employer may now require a fitness-for-duty certification to address the employee's ability to perform the essential functions of his or her job; and
- An employer may require an employee, who is taking intermittent or reduced schedule leave, to submit a fitness-for-duty certification – before the employee is allowed to return to work – if reasonable safety concerns exist regarding the employee's ability to perform.

Light Duty

The regulations clarify that time spent in a light duty position will not count against an employee's 12 weeks of FMLA leave. Further, reinstatement rights are not affected by an employee's voluntary acceptance of a light duty assignment.

Substitution of Paid Leave

Although FMLA leave is unpaid, employees may decide to use, or an employer may require employees to use, accrued paid leave during their FMLA leave. Under the current regulations, different rules apply depending upon the type of paid leave that is substituted (*i.e.*, vacation versus sick time). Under the revised regulations, however, the same rules will apply to all forms of paid leave (*i.e.*, vacation, personal leave, family leave, paid time off, sick leave, etc.), and the employee will be mandated to follow the terms and conditions of the applicable employer policy for use of that type of leave. The revised regulations make clear that an employee's ability to use his or her paid leave is determined by the terms and conditions of the employer's normal leave policies. Therefore, if an employee does not comply with the requirements in the employer's policy, the employee will not be allowed to substitute paid leave. Also, the employer retains the discretion to waive any procedural requirements for use of the paid leave policy in issue.

Notice Requirements

Employer Notice Obligations

An employer's notice obligations are scattered throughout various provisions of the current regulations. The DOL has attempted to minimize the confusion and improve communications by merging the notice obligations imposed on employers into one section within the revised regulations.

Employers have always been required to notify their employees of the employer's FMLA policy. The DOL requires employers to post a general notice in a conspicuous location in the workplace that highlights the FMLA's provisions and contains information regarding the procedure for filing complaints of FMLA violations. The DOL's final rule requires an employer to distribute this general notice to each employee by placing this information in an employee handbook, or by providing each new employee with a copy of the general notice at the time of hire. This requirement can be satisfied by either distributing an electronic or paper copy of the general notice.

Under the revised regulations, an employer now has 5 business days, rather than 2, to respond to an employee's request for FMLA leave and/or designate an employee's request as FMLA leave. In addition, however, the employer must now provide the following information, in writing, to the employee: (1) a statement about whether the employee is eligible for FMLA leave; (2) an explanation of how much FMLA time the employee has available, and (3) an explanation of the employee's rights and responsibilities under the law.

Employee Notice Requirements

The DOL recognized that lack of advance notice for unscheduled absences has been an unintended and disruptive consequence of the current FMLA regulations. In an effort to combat this continuing problem, the DOL's final rule has attempted to address the issue in several ways.

- The revised FMLA regulations require an employee needing FMLA leave, including intermittent leave, to follow the employer's usual and customary call-in procedures for reporting an absence, which may include calling a designated telephone number or a specific individual to report the absence.
- Under the current FMLA regulations, when the need for leave is unforeseeable, employee's are required to give an employer notice for leave "as soon as practicable," which has often been interpreted to mean within 2 days. The DOL's final rule has clarified the meaning of the phrase "as soon as practicable" and provides that the employee must "promptly" notify the employer. The DOL expects that in most cases, an employee should be able to provide notice of unforeseeable leave within the time required under the employer's call-in policy, absent unusual circumstances.
- The revised FMLA regulations also tighten the requirements on the information that an employee must provide to trigger FMLA coverage. While employees do not have to expressly state that they are requesting "FMLA leave," they must now provide sufficient information for the employer to determine whether the FMLA applies, including information on the medical condition or other qualifying reason for the absence, and the anticipated duration of the absence. An employee, who has already qualified for FMLA leave (*e.g.*, intermittent leave), must specifically report the qualifying reason or the need for FMLA leave when calling to report an unforeseeable absence. A call-in from an employee's designee (*e.g.*, family member) continues to be acceptable if the employee is unable to place the call.

Penalties for Notice Violations

The revised regulations implement some technical regulatory changes that are the direct result of the Supreme Court's decision in *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002). This case invalidated the current regulation which imposed a categorical penalty each time an employer violated the FMLA's notice requirements. Under *Ragsdale* and the revised regulations, an employer may only be held liable if an employee suffers individual harm due to an employer's failure to follow the FMLA's notification rules.

Perfect Attendance Awards

Under the current regulations, an employer is prohibited from counting FMLA leave against an employee when handing out perfect attendance awards. This rule has often been deemed by both employers and employees as unfair. The DOL's final rule enables employers to deny perfect attendance awards and similar bonuses to an employee who takes FMLA leave. There is one caveat – employers may deny perfect attendance bonuses to employees taking FMLA leave only if they also deny perfect attendance bonuses to those employees taking non-FMLA leaves of absence.

Waiver of Rights

The revised FMLA regulations formalize the DOL's long-held position that an individual may voluntarily settle and/or release his or her FMLA claims without obtaining prior approval from a court of law or the DOL. The DOL's final rule, however, prohibits an individual from waiving his or her FMLA rights prospectively.

Practical Considerations

The revised regulations are comprehensive and contain many changes beyond those highlighted in this memorandum. As previously noted, the DOL's final rule will take effect on January 16, 2009. During the next sixty days, there are several practical steps that employers should take to prepare their workplaces:

1. Review your current FMLA policy to see what changes and revisions need to be made to comply with the revised FMLA regulations. If, for example, your policy does not address the new military leave provisions, it should be revised.
2. Check your FMLA medical certification forms, postings, and the notice and rights/obligations forms that you provide to employees. These should be updated to reflect the new time periods that employees now have to provide information.
3. Check your Company's other existing paid leave policies (*i.e.*, vacation, sick, PTO, etc.) to ensure that the eligibility requirements and notification procedures are clear.

In the near future, Bond, Schoeneck & King, PLLC will host a Breakfast Briefing to provide a more comprehensive discussion of the DOL's revised FMLA regulations. In the meantime, if you have any questions or concerns regarding the DOL's final rule, please contact us:

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