

THE 2009 REVISED REGULATIONS OF THE FAMILY AND MEDICAL LEAVE ACT

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**Representing Workers in FMLA Retaliation & Interference Claims
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Introduction

On November 17, 2008, the U.S Department of Labor (“DOL”) proposed a series of new regulations for the Family and Medical Leave Act (“FMLA”), 29 U.S.C. §2601-2604.² During the subsequent comment period for these proposed new regulations, DOL received more than 5,000 submissions from employers, employee groups, family members, members of Congress, and interested labor and nonprofit organizations who had experience with the FMLA over the 15 years of its existence. The final regulations have been effective for about a year and a half, since January 16, 2009.

Ultimately, the final regulations altered the FMLA in a few substantive ways, most notably newly authorizing the use of FMLA leave for reasons connected to military service for the families of servicemembers. Although the majority of the changes could likely be described as procedural, they will have a substantial impact on the duties and obligations of employees seeking FMLA leave, the designation of absences as FMLA leave, the use of paid sick time, and the right of employers to obtain medical information from employees’ doctors.

The New Regulations

A. Military-related Leave

The most notable addition to the FMLA regulations is the provision protecting leave for employees due to the military service of their family members, which was mandated by the National Defense Authorization Act for FY 2008 (“NDAA”), Public Law 110-181. The DOL decided to use roughly the same procedures for taking military family leave as are used in taking regular FMLA leave. The new regulations, therefore, essentially add a new category of job-protected leave while maintaining the procedural framework with which employers and employees have become familiar. Rather than a medical certification as might be required in the typical FMLA setting, however, an employer may request some other kind of supporting documentation in the unique circumstances of a qualifying exigency or military caregiver.

1. Leave to Care for an Injured Servicemember

If an employee’s spouse, child, parent, or next-of-kin is a member of the Armed Forces (including the National Guard or Reserves) who sustained a serious injury or illness in the line of duty, the new regulations provide up to 26 weeks of leave during a “single 12-month period” for the employee to care for that injured family member. 29 CFR § 825.127(a). This is in excess of the 12 weeks of leave typically allowed for other qualifying reasons under the FMLA. Note that the military caregiver may be the next-of-kin of the injured servicemember; this is different from the normal family leave provision of the FMLA, which permits only spouses, parents, or children to take leave to care for an family member with a serious health condition.

The “single 12-month period” for counting military caregiver leave begins on the first date that the employee begins leave to care for a military caregiver and ends 12 months after that

² The DOL’s FMLA regulations are codified at 29 C.F.R. § 825 et seq.

date. This will often be different than the method the employer uses to calculate other forms of FMLA leave, which typically are backward-looking and (with the exception of maternity/paternity leave, which must be taken within the first 12 months after the birth or adoption of the employee's child) do not have a particular end date. 29 CFR § 825.127(c)(1). If, therefore, the employee has already taken 8 weeks of leave during the preceding 12 months for, for example, maternity leave, she will then be entitled to up to an additional 26 weeks of leave, in the 12 months going forward, to care for an injured servicemember. The total weeks of leave during the "single 12-month period," however, may not exceed the 26-week maximum. If, therefore, an employee takes 21 weeks of leave to care for an injured servicemember, and then wishes to take maternity leave later that same year, she will only have 5 weeks of leave remaining. 29 CFR § 825.127(c)(3). The employee may take another block of leave to provide care for a subsequent injury to the same or to another servicemember, so long as the total leave does not exceed 26 weeks within the single 12-month period.

If two types of FMLA leave could arguably apply to a single period of leave, the regulations require that they not be counted concurrently, and that the military caregiver leave be applied first. For example, if a pregnant employee takes leave to care for an injured servicemember, she could take 14 weeks of leave to care for the injured servicemember, and still then have the ability to take up to an additional 12 weeks of leave for reasons relating to her pregnancy. Similarly, an employee's right to take up to 12 weeks of leave to care for a family member with a serious health condition is not exhausted by virtue of taking leave to care for an injured servicemember.

2. Leave Required by a Servicemember's Deployment

The new regulations also allow the spouse, child, or parent of an active servicemember (a servicemember on active duty, or one who has received notice of an impending call to active duty) to take up to 12 weeks of leave per 12-month period to deal with "any qualifying exigency" caused by their family member's deployment. "Qualifying exigency" is defined fairly broadly to include (1) short-notice deployment, (2) military events and related activities, (3) childcare and school activities, (4) financial and legal arrangements, (5) counseling, (6) rest and recuperation, (7) post-deployment activities, and (8) additional activities to which the employer consents. 29 CFR § 825.126(a). The time period during which that leave may be taken may depend on the particular qualifying exigency. *Id.* The DOL's certification form for military-related qualifying exigencies is available online at www.dol.gov/esa/whd/forms/wh-384.pdf.

B. Types of Notice an Employer Must Provide an Employee

The FMLA's new regulations now set forth four types of notice about an employee's FMLA rights an employer must provide to an employee, and how those types of notice must be provided. They are:

General notice – New employees must be apprised of their FMLA rights in writing, in an employee handbook or otherwise "upon hiring." 29 CFR § 825.300(a).

Eligibility notice – When an employee requests (for the first time) leave which may be

FMLA-qualifying, the employer must notify the employee of their eligibility to take FMLA leave within 5 business days. If the employee is not eligible for FMLA leave (e.g. they have not worked for the employer for at least 12 months), the employer notice must state at least one reason why the employee is ineligible. 29 CFR § 825.300(b). An “eligibility notice” form approved by the DOL is available online at www.dol.gov/esa/whd/fmla/finalrule/WH381.pdf.

Rights and Responsibilities notice – If the employer determines that the requesting employee is eligible for FMLA leave, then it must, at the same time it provides the Eligibility notice, provide a written description of the FMLA process, the employee’s obligations during that FMLA process, and the consequences of the employee’s failure to meet these obligations. Such notice must include: (1) an explanation that if FMLA leave is granted it will be deducted from the employee’s 12-week allowance, (2) requirements for employees to submit medical certifications and the consequences for failing to do so, (3) any employer requirements regarding the substitution of paid leave such as sick time or vacation, (4) requirements for employee to maintain health benefits during FMLA leave, including payment of premiums, (5) key employee status, if applicable, (6) employee rights to maintain benefits and to job restoration following leave, and (7) the employee’s potential liability for unpaid health insurance premiums if the employee fails to return to work following leave. 29 CFR § 825.300(c). A “rights and responsibilities notice” form approved by the DOL is available online at www.dol.gov/esa/whd/fmla/finalrule/fmlaposter.pdf.

Designation notice – within 5 days of receiving sufficient information from the employee and his or her healthcare provider, the employer must notify the employee in writing whether the requested leave is FMLA-qualifying. 29 CFR § 825.300(d). The designation notice must also include any “fitness-for-duty” certification that the employer may later request. It must also inform the employee of the amount of leave that will be deducted from the 12-week FMLA allowance for the particular period of FMLA leave; if this calculation cannot be performed at the time the leave is granted (e.g., where the amount of leave is unforeseeable or sporadic), the employer must provide such information upon an employee’s request, but not more often than every 30 days. *Id.* A “designation notice” form approved by the DOL is provided online at www.dol.gov/esa/whd/forms/WH-382.pdf.

C. **Notice by the Employee of Need for FMLA Leave**

The DOL made several changes to the requirements of employees to provide notice of the need for FMLA leave. Generally speaking, an employee need not specifically use the words “FMLA” or other “magic words” when requesting FMLA leave, but need only “provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave.” 29 C.F.R. § 825.302(c). If the employee has requested leave for a reason that may be FMLA-qualifying, it is the employer’s burden to then ask sufficient questions about the purpose of the leave, the duration of the leave, and the health condition for which the leave is sought to determine if the leave request does in fact fall under the FMLA. *Id.* The new regulations clarify, however, that “[w]hen an employee seeks leave due to a FMLA-qualifying reason for which the employer has previously provided FMLA-protected leave, the employee must specifically reference the qualifying reason for leave or the need for FMLA leave.” *Id.*

Additionally, for unscheduled or unforeseeable periods of FMLA leave, previous DOL regulations had permitted an employee to give notice to an employer of his/her need for FMLA leave as soon as practicable but up to 2 days after the FMLA-qualifying leave period began. DOL changed the regulation to require employees to abide by their employer's "usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances." 29 C.F.R. § 825.302(a), (d). This would include, for example, an employer's normal call-in procedures for requesting sick leave. Failure by the employee to properly notify the employer of an absence may cause a delay or denial of FMLA protections. 29 C.F.R. § 825.302(d). The intent of these changes, according to the DOL, was to reduce some of the uncertainty and disruption in the workplace caused by an employee taking unexpected, unscheduled leave.

D. Medical Certification

The new regulations amended the conditions of the medical certification process. The DOL increased the usual timeframe during which an employer should request medical certification from two business days to five business days after the employee provides notice of the need for FMLA leave. 29 C.F.R. § 825.305(b). The employee must then provide the requested certification to the employer within the timeframe requested by the employer, which must allow at least 15 calendar days after the employer's request. *Id.* If "it is not practicable under the particular circumstances" for the employee to provide the requested certification "despite the employee's diligent, good faith efforts," however, then the normal 15-day deadline for providing the certification would not apply. *Id.* This may be the case, for example, if the employee has requested the certification from his healthcare provider but the healthcare provider has not yet returned it to him, due to no fault of the employee, or because the employee's medical condition has prevented him from communicating more promptly with his healthcare provider.

If the employer feels that the certification provided by the employee fails to provide necessary information regarding the employee's FMLA leave request, it must notify the employee of this, in writing, and the employee then has 7 days to cure the deficiency. If the employee fails to provide the missing information, the employer may deny the request for leave. 29 C.F.R. § 825.305(c), (d).

Under the new regulations, should the employer need clarification or authentication of information provided by the employee on the certification form, a representative of the employer (e.g. an HR employee, leave administrator, or management official) may contact the employee's healthcare provider to seek that information – but it cannot be the employee's direct supervisor. 29 CFR § 825.307(a). The employer may not, however, ask the healthcare provider for additional medical information, beyond that required by the standard DOL FMLA certification form.³ *Id.*

³ The FMLA does not, however, prevent an employer from properly following the information gathering procedures authorized by another statute, and then using the information when determining eligibility for FMLA leave. For example, if the employee's serious health condition may also represent a disability under the ADA, and if that employee has requested an

E. Medical Re-Certification

The new regulations clarify how often an employer may request that the employee re-provide medical certification regarding his or her FMLA leave. If an employee's medical condition is an ongoing one of indefinite duration, the employer can request that the employee's healthcare provider re-certify the condition every six months. 29 C.F.R. § 825.308(b). The employer may also request recertification during any new "leave year." 29 C.F.R. § 825.305(e). This is especially relevant in cases where the employee requires intermittent leave over an extended period to deal with chronic or ongoing qualifying conditions, e.g. asthmas or diabetes.

If the leave requested for a serious health condition is limited and not ongoing, an employer may request re-certification after the length of leave originally requested (e.g. after 8 weeks if 8 weeks was originally requested), or more quickly if the circumstances have changed significantly (e.g. if the nature or duration of the leave requested changes significantly, or if the employer receives new information that suggests that the FMLA leave may have been used improperly). 29 C.F.R. § 825.308(a), (b), and (c).

F. Fitness-for-Duty Certifications

Before allowing an employee on FMLA leave for the employee's own serious health condition to return to work, an employer may generally require the employee to obtain a fitness-for-duty certification from his or her healthcare provider. The new regulation clarifies that the employee's obligation to provide complete certification in the fitness-for-duty context is the same as in the initial medical certification process. 29 C.F.R. § 825.312(a). The regulation also clarifies that the employer may contact the employee's healthcare provider directly for purposes of authenticating or clarifying the fitness-for-duty certification, in the same manner as it would for an initial medical certification. Id. The employer can require that the fitness-for-duty certification address the employee's ability to perform the essential job functions of the employee's job, provided that it provides the employee with a list of those functions no later than its deadline to provide notice that the leave will be designated as FMLA leave. 29 C.F.R. § 825.312(b).

If the employee is taking FMLA leave on an intermittent or reduced leave schedule basis, the employer may request a fitness-for-duty certification up to once every 30 days, but only if reasonable safety concerns exist regarding the employee's continuing ability to perform his or her duties based on the serious health condition for which the employee took such leave. 29 C.F.R. § 825.312(f).

G. Substitution of Paid Leave

Under the new regulations, an employee's ability to cover a period of unpaid FMLA leave with paid leave (e.g. sick leave or vacation leave) will be governed by the employer's

accommodation under the ADA, the employer may consider information obtained through the ADA information gathering process. 29 CFR § 825.306(d).

normal rules for requesting paid leave. 29 C.F.R. § 825.207. For example, if an employee requests leave to care for an immediate family member with a serious health condition, that leave would still be entitled to protection under the FMLA. If the employer's normal policy was allow employees to use sick leave only when the *employee* was ill (as opposed to when the employee was caring for a sick family member), however, the employer would not be obligated to allow the employee to use paid sick leave during that FMLA leave period.

The regulations also clarify that this new “substituted” paid leave actually means paid leave “running concurrently” with FMLA leave – even though the new regulations deleted the term “running concurrently” when describing substituted paid leave. Thus, the 12-week period begins running when the FMLA leave is taken, even if a portion of it is paid sick leave. Worker's compensation pay similarly may be counted against the FMLA leave entitlement. 29 CFR § 825.207(e). Finally, the new regulations state that in the case of public employees, accrued compensatory time may be substituted for FMLA leave in the same way as private employees may substitute sick leave time. 29 C.F.R. § 825.207(i).

H. Employee Eligibility Requirements

The new regulations clarify that an employee may become eligible for FMLA purposes while on employer-provided leave, such as vacation or annual leave, sick leave, administrative leave, etc. 29 C.F.R. § 825.110(d). In other words, if an employee is on employer-provided leave, that leave counts toward the accrual of the 12-months of employment required for FMLA eligibility, and FMLA rights will vest at the time the 12 months is reached, even if the employee is on leave at that time. *Id.* Accordingly, leave that begins before FMLA eligibility (for example, when the employee has worked for the employer for 11 ½ months) may start out as “non-FMLA” qualifying leave, but if an employee becomes eligible for FMLA leave in the midst of the absence, FMLA protections are triggered from that point forward.

To qualify for FMLA leave, an employee must have worked for an employer for a total of 12 months – which may be nonconsecutive – and logged at least 1,250 hours of service for the employer in the 12-month period preceding the leave. 29 C.F.R. § 825.110(a)(1)-(2). The new regulations require that, barring an employer policy or agreement to the contrary, the employee's 12 total months of previous employment must have occurred within seven years preceding the leave. 29 C.F.R. § 825.110(b)(1). If, however, the leave is occasioned by military service obligations to the National Guard or Reserves, employment prior to the break in service must be counted toward the 12-month and 1,250-hour requirements even if it is more than seven years prior to leave, as must the time that the employee would have worked for the employer but for mandatory military service. 29 C.F.R. § 825.110(b)(2)(i). There is also an exception from the 7-year cap if an employer has executed a written agreement to rehire the employee after the break in service. 29 C.F.R. § 825.110(b)(2)(ii).

Finally, the new regulations and accompanying explanations clarify that the determination as to whether the employer has 50 employees within a 75-mile radius occurs at the time the employee gives notice of leave. Numerous people had sought to have the policy revised such that the counting would occur at some other juncture, such as at the time the leave was

actually taken or at the time a lawsuit was subsequently filed. The DOL rejected these calls for revision and opted to carry over the existing language and policy. 29 C.F.R. § 110(e).

I. Release of FMLA Claims

The new regulations clarify language which had generated confusion regarding the release and waiver of FMLA claims. 29 C.F.R. § 825.220(d) states that “[e]mployees cannot waive, nor may employers induce employees to waive, their rights under FMLA.” The Fourth Circuit Court of Appeals, in Taylor v. Progress Energy, Inc., held that a release of FMLA claims in a settlement agreement with an employer violated this regulation, unless the release agreement has received express approval from the DOL or a court. See 415 F.3d 364, 369 (4th Cir. 2005) (“Taylor I”). After the defendant filed a petition for rehearing en banc, the DOL filed an amicus brief, interpreting 29 C.F.R. § 825.220(d) as prohibiting only the *prospective* waiver of FMLA claims, and not the *retrospective* waiver of FMLA claims based on asserted past conduct. Nevertheless, on rehearing the Fourth Circuit disagreed with the DOL’s interpretation of its own regulation, finding that the plain meaning of 29 C.F.R. § 825.220(d) prohibited retrospective as well as prospective release of claims absent DOL or court approval. See Taylor v. Progress Energy, Inc., 493 F.3d 454 (4th Cir. 2007) (“Taylor II”).

This interpretation by the Fourth Circuit made it cumbersome for private counsel to draft settlement and release agreements, both within the Fourth Circuit, where the Taylor case governed, and even outside the Fourth Circuit, where it remained unclear whether other Courts of Appeal might adopt Taylor’s logic. This was true not only for cases in which the employee had directly asserted an FMLA claim, but also in cases in which the employee had never asserted any FMLA claim, because the employer still wished to ensure that it was receiving a binding, global release of claims as part of any settlement. To work around the Taylor decision, counsel sometimes resorted to inserting into release agreements additional language whereby the employee acknowledged that he or she did not have any FMLA claims, that he or she agreed not to receive any compensation for any FMLA claim, etc.

The new regulation clarifies that the prohibition against waiver of FMLA rights “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.” 29 C.F.R. § 825.220(d). Absent further contrary interpretation by the Fourth Circuit, this should allow retrospective release of FMLA claims without the use of cumbersome settlement agreement language on this issue.

J. Retroactive Designation of FMLA Leave

One regulatory change was adopted in response to the Supreme Court’s Ragsdale v. Wolverine Worldwide decision, in which the Supreme Court called into question a DOL regulation which stated that an employer could not retroactively designate leave as FMLA leave. See 533 U.S. 81 (2002). The DOL held that the regulation in question is still valid, but that its applicability must be made on a case-by-case basis. 29 C.F.R. § 825.300(e). The main consideration is whether the employee has suffered individualized harm because of an employer’s failure to timely comply with the notice requirements of the FMLA. Id. If so, the retroactive designation of leave as FMLA leave could constitute interference with or denial of

FMLA leave, and subject the employer to damages. This could include “compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered.” Id.; see also 29 U.S.C. § 2617(a)(1) (the FMLA’s damages provision). If it will not cause the employee any harm under the particular circumstances, then the employer may retroactively designate leave as FMLA leave.

K. Bonuses

In a change from the previous regulations, when an employer maintains a bonus award for employees based on the “achievement of a specified goal such as hours worked, products sold, or perfect attendance,” it may decline to provide the bonus to an employee who has not met the requisite threshold for the bonus due to FMLA leave. For the purpose of determining eligibility for such bonuses, however, the employer must treat FMLA leave and similar non-FMLA leave the same. 29 C.F.R. § 825.215(c)(2).

L. Healthcare Provider Visit Requirements for Serious Health Conditions

The DOL made several changes to its definition of “continuing treatment” to make the definition less open-ended. One of the most commonly-used definitions of “serious health condition” is “incapacitation for more than 3 consecutive calendar days.” Technically, this is “incapacitation for more than 3 consecutive days, plus two or more visits to a healthcare provider, or one visit to a healthcare provider followed by a regimen of ongoing treatment.” 29 C.F.R. § 825.114(a)(2)(i)(A). In the new regulations, the DOL clarified that the first visit to a healthcare provider must be within the first 7 days after the onset of incapacity / leave and the second visit must be within the first 30 days, barring extenuating circumstances. 29 C.F.R. § 825.115(a)(3). Moreover, the visits must be “in-person.” The new regulations also clarify that the period of incapacity must be more than 3 consecutive “full” calendar days – parts of days do not count toward the 3-day requirement. Id.

Some view these changes as necessary to provide adequate documentation for employers, and to avoid malingering by employees. Others note that the changes place greater burdens on incapacitated employees, and ignore the reality that multiple visits to a health care provider within the first 30 days may not be medically necessary.

Chronic conditions, such as asthma, diabetes, or epilepsy, also qualify as serious health conditions under the FMLA. FMLA regulations previously defined chronic conditions as ones which require periodic visits to a health care provider, continue over an extended period of time, and which may cause episodic rather than a continuing period of incapacity. 29 C.F.R. § 825.115(c). The DOL’s new regulation notes that the “periodic treatment” required for a chronic condition must be at least twice a year. 29 C.F.R. § 825.115(c)(1).

M. Holidays

A practical, technical clarification in the new regulations concerns the effect of holidays, such as Christmas, Thanksgiving, the Fourth of July, etc. The new regulations state that the observance of a holiday during an employee's 12 weeks of leave does not affect the 12-week entitlement – the weeks still count as full weeks regardless of the holidays. 29 CFR § 825.200(h). If, however, an employee is taking leave in intermittent, partial weeks, the presence of a holiday during a given week does not count against the 12 weeks of leave unless the employee was scheduled and expected to work on the holiday. Id.

N. Adoption

The new FMLA regulations clarifies that use of FMLA leave because of the placement of an adopted child may include time to “travel to another country to complete an adoption.” 29 CFR § 825.121(a)(1).

O. Professional Employment Organizations as Joint Employers

The employer status of professional employer organizations (“PEOs”), whose role is usually to assist companies by outsourcing their payroll and benefits administration, has been clarified in the new regulations. There was previously confusion as to whether a PEO could be considered a joint employer for FMLA purposes, especially given that the PEO often becomes an employer of record through the contract it signs with its client companies. Because of the increased use of such companies in recent years, the DOL decided it was necessary to specifically address the unique role PEOs play.

In the revised regulation, 29 C.F.R. § 825.106, PEOs are to be subjected to an “economic realities” test to determine their status as joint employers. Thus, if a PEO does not actually hire, terminate, or otherwise control a client's employees, and instead performs only administrative functions such as payroll, it is unlikely to be considered a joint employer. Even if a PEO is a joint employer, moreover, this does not mean that all of a PEO's employees and those of its other clients will be counted when determining the threshold FMLA questions as to whether there are 50 employees within a 75-mile radius. Rather, these employees would only be counted in the unlikely situation in which they are economically dependent on the client employer.

Practically speaking, this is not a dramatic change in the protections afforded to those whom the FMLA is designed to protect, but given that the use of PEOs for certain administrative functions tend to result in a reduction in the number of employees actually employed by their client corporations, the result may be slightly fewer companies that reach the 50-employee threshold for FMLA coverage.

P. “Light Duty” Assignments

The new regulations clarify that if an employee agrees to return to a “light duty” assignment that allows him or her to return to work notwithstanding his or her medical condition, that period of “light duty” assignment does not count against his or her FMLA leave entitlement. Additionally, if an employee agrees to return to a light duty assignment, he or she does not give up the right to be restored to his or her original or an equivalent position; rather, the right to

restoration is held in abeyance while the employee is working in the light duty assignment. 29 C.F.R. § 825.207(e), 220(d).

Q. Intermittent Leave

The new regulations clarify that, when calculating intermittent or reduced schedule leave, the employer must use increments of no greater than one hour. 29 C.F.R. § 825.205(a). For example, if an employee takes off one hour as intermittent FMLA leave, the employer may not charge a half-day against the employee's FMLA leave balance, even if that is the employer's customary practice with respect to other forms of leave.

While employers had sought clarification on other aspects of the use of intermittent leave, the final regulations make only minor changes that do not appear to fully address the confusion. For example, the original FMLA regulations stated that in scheduling intermittent leave, employees must "attempt" not to "disrupt" the operations of the employer. This vague standard was replaced with language nearly as vague, stating that an employee "must make a reasonable effort" not to "disrupt unduly" the employer's operations. 29 C.F.R. § 825.203. The practical difference intended by this change in language is unclear, and it remains to be seen whether it will be interpreted differently by the courts.