LawTrends

A publication of Eastman & Smith Ltd.

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ATTORNEYS AT LAW
Established 1844

January 2009
Special Issue

New FMLA Regulations Require New Employment Policies and Procedures

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In January 2008, President Bush signed into law the first-ever amendment to the Family and Medical Leave Act, creating two new rights to employee leave in the event of certain military-related situations. On January 16, 2009, the Department of Labor (DOL) will begin enforcing new rules: 1) implementing the military-style leaves; and 2) changing the practices, policies and documents used by employers in traditional FMLA scenarios for the past 15 years. Employers who have not already done so should review and update policies, procedures, practices and forms to ensure compliance with FMLA when managing employee leave in 2009. The new regulations include a number of revisions and clarifications. Counsel should be sought to understand them all. This article will address some of major points of which employers need to be aware.

DEFINITION OF SERIOUS HEALTH CONDITION

The fundamental question of whether an employee or employee's family member has a serious health condition is one of the issues that has caused great confusion and litigation. For example, one of the definitions of serious health condition requires a period of incapacity plus "continuing treatment." The new regulations clarify that the employee or family member must be incapacitated for more than

three consecutive *full* calendar days. Furthermore, the new regulations require an employee or family member to: 1) see a health care provider within first seven days of incapacity; and 2) receive treatment two times within the first thirty days of the first date of incapacity (absent extenuating circumstances).

EMPLOYER NOTICE REQUIREMENTS

The new FMLA regulations clarify and expand employers' obligations to educate employees about rights under the FMLA. There are generally four employer notice requirements under the new regulations, and DOL has published forms for employers to use to meet three of the requirements.

1. A Poster/General Notice of Rights and Responsibilities is required to be posted and distributed to every employee – even if the employer has no eligible employees.

2. The General Notice (or something substantially similar) must be provided to employees within five business days after the employee's need for leave is made known to the employer.

3. A new "Designation Notice" must be directed to each employee to communicate the decision granting the FMLA leave. This notice is particularly significant to employers who desire a fitness for duty certification upon an employee's return from leave. Such certification can be required only if communicated as part of the Designation Notice and the physician's certification of fitness will be based only upon such essential job function information as the employer provides or attaches to the Designation Notice. A failure to attach a job description or to otherwise accurately describe job duties will cause the physician to certify fitness to return to work based solely upon the employee's description of job activities.

4. Finally, employers with handbooks are required to communicate FMLA rights, responsibilities and policies in the handbook. For many employers, the new regulations will also demand that a copy of the General Notice be distributed at new employee orientation.

The regulations specify when and how to distribute notices to employees and include penalties for failing to comply with the notice requirements. It is critical that employers familiarize themselves with notice requirements and seek counsel with regard to the timing and content of each requisite notice.

EMPLOYEE NOTICE REQUIREMENTS

The new FMLA regulations reinforce the fact that FMLA leave, generally, requires advance notice by employees. The DOL also admonishes employees that they must attempt to minimize the impact of disruptive unscheduled employee absences. Finally, DOL has changed its long-standing position and now permits employers to demand that FMLA-eligible employees follow the usual and customary call-in procedures for reporting an absence. Failure to comply with the employer's leave procedures may be grounds for delaying or denying an employee's request for FMLA-qualifying leave.

MEDICAL CERTIFICATION PROCESS

Under the new rules, the medical certification process has been substantively changed in ways that largely benefit employers. Several new medical certification forms replace the previous DOL approved form and permit employers to seek more detailed information about a health care provider and an employee or family member's need for leave. Furthermore, DOL focuses much attention on employers' rights to demand complete certifications and to require correction or supplementation of incomplete or insufficient medical certification forms. Finally, certain employer representatives (although not the employee's direct supervisor) are now permitted to directly contact a health care provider to authenticate a certification and, with the employee's consent, to directly contact the physician for the purpose of clarifying the information on the certification form.

MILITARY CAREGIVER LEAVE AND QUALIFYING EXIGENCY LEAVE

The 2008 amendments to the FMLA allow family members of wounded military personnel to take up to 26 workweeks of leave in a single 12 month period to provide medical care to the servicemember and also provide for families of certain servicemembers to take leave for qualifying exigencies. Leave for a qualifying exigency is available only to family members of members of the National Guard or Reserves, not to family members of members of the regular armed forces. The final rules define a "qualifying exigency" to include a number of broad categories, such as:

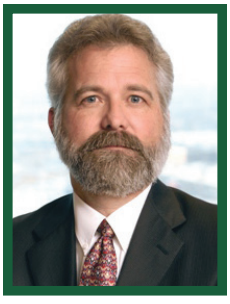
- short-notice deployment
- military events and related activities
- child care and school activities
- financial and legal arrangements
- counseling
- rest and recuperation
- post-deployment activities

The regulations also permit the employer and the employee to discuss and agree that activities other than those specifically listed can constitute an appropriate reason to grant FMLA leave, provided the employee and employer also agree to both the timing and duration of such leave. Military caregiver leave and qualifying exigency leave are counted as part of the 12 week allotment of FMLA leave available to an employee.

CONCLUSION

Employers should become familiar with the new regulations and prepare to use or adapt the new forms created by DOL. Covered employers should review posting and notice practices to make sure all required employee notices are distributed at the correct times, including at orientation and at application for leave, and in the correct locations (i.e. new policies in handbooks). Employers currently with too few employees to be covered by FMLA would be wise to review policies and practices as well as to carefully monitor legislative developments because there is a good chance that employers will see FMLA expanded in the coming year to cover businesses employing as few as 25 employees.

Not only should employers make sure policies, procedures, practice, and forms are updated to reflect the changes to FMLA, it is important to train all supervisors about the requirements of the law as well as to ensure that all practices related to hiring, attendance, promotions, harassment and retaliation are carefully and accurately communicated. Employers should become familiar with EEOC's recent Enforcement Guidance regarding Unlawful Disparate Treatment of Workers with Caregiver Responsibilities and expect that DOL and EEOC will be proactive in investigating complaints related to employee leave.



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