

CLIENT ALERT

FEBRUARY 2009

New Fmla Regulations Released: Implications For Employers

On January 28, 2008, President Bush signed amendments to the Family and Medical Leave Act of 1993 (FMLA) into law. On November 17, 2008, the United States Department of Labor (DOL) published its Final Rule to implement these amendments. These regulations, which are the first in the FMLA's fifteen-year history, took effect on **January 16, 2009**. Highlights of the regulatory changes in the Final Rule include:

- ***Changes to employee eligibility.*** To be covered under the FMLA under the old rules, an employee had to be employed by the employer for at least 12 months and work at least 1250 hours during the 12 months preceding the start of the requested FMLA leave. Those 12 months were not required to be consecutive, so any employment, regardless of gaps in employment, with that employer counted toward the eligibility period. Under the Final Rule, periods of employment before a break in employment of seven years or more are not counted in determining whether an employee has been employed for 12 months, subject to some exceptions. Additionally, employees taking leave due to military obligations must be credited for the hours of service they would have performed but for their military obligations.
- ***Revisions to the definition of "serious health condition."*** Employees must now show 2 visits to a health care provider during the first 30 days of incapacity. Those with chronic serious health conditions must show at least 2 visits per year to health care providers.
- ***Provides two new military family leave entitlements:*** Military Caregiver Leave and Qualifying Exigency Leave. Military Caregiver Leave provides up to 12 weeks of job protected leave to spouses, parents, children, or next of kin caring for recovering military service personnel who develop a serious injury or illness while serving in the armed forces. Qualifying Exigency Leave entitles an employee to a maximum of 26 weeks of leave during a single 12-month period. for a "qualifying exigency" arising out of the employee's spouse, son, daughter, or parent being on active duty or having been notified of an impending call to active duty.

- ***Allowance of penalties*** where an employee suffers individualized harm due to the employer's failure to follow notification rules.
- ***Clarification regarding light duty work.*** If an employee voluntarily performs light duty work, the time spent doing such work will not count against the employee's FMLA leave entitlement. Additionally, the employee's right to job restoration is suspended during the light duty period.
- ***Allowance for the substitution of paid leave.***
- ***Requirement that employers provide employees with a general notice*** about the FMLA, such as through a poster, an employee handbook, or upon hire, an eligibility notice, a rights and responsibilities notice, and a designation notice.
- ***Explanation regarding the treatment of perfect attendance awards.*** Employers may deny perfect attendance awards to employees who took FMLA leave as long as the employer treats employees taking non-FMLA leave the same way.
- ***Changes to the fitness-for-duty certification process.*** Currently, fitness for duty certifications only need to contain a "simple statement" that the employee can return to work. The Final Rules requires health care providers to certify that employees can resume work.
- ***Allowance for the voluntary settlement or release of FMLA claims without court or Department of Labor approval.***

Due to these significant changes, we are advising our clients to carefully review and revise their FMLA policies and employee handbooks and update their FMLA posters and notices. Employers may also want to consider offering workplace training regarding the new FMLA regulations. If you would like to speak to someone about these new regulations, please contact Diane M. DeGiacomo, Chair of our Employment Law Group.

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