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NEW FMLA REGULATIONS TAKE EFFECT EARLY IN 2009— A RANGE OF SIGNIFICANT CHANGES AND CLARIFICATIONS

On November 17, 2008, the Department of Labor released final regulations under the Family Medical Leave Act. These new regulations, effective January 16, 2009, implement the military leave amendments and modify existing FMLA regulations.

The changes range from employee eligibility criteria to notice requirements. Summaries are provided below with comparisons to existing rules, where appropriate. It is imperative that employers covered by the FMLA understand the new regulations and update their policies to comply with them.

Highlights of the New Regulations

Military Family Leave:

The new regulations provide two additional qualifying reasons for employees to take FMLA leave.

Leave to Care for a covered service member who is seriously injured. 29 C.F.R. § 825.127

> Eligible employees are entitled to 26 workweeks of leave in a single 12-month period to care for a covered service member who is seriously injured or ill, if that employee is the service member's spouse, child, parent, or next of kin. For purposes of this provision, the 12-month period to be used for tracking leave begins when the employee starts using his or her leave. An employee is not entitled to more than 26 weeks of FMLA leave during that 12-month period (that is, an employee is not entitled to 26 weeks leave under this provision and then an additional 12 weeks of leave for other FMLA qualifying reasons).

Leave to deal with a "qualifying exigency." 29 C.F.R. § 825.126

> Eligible employees are entitled to 12 workweeks of leave to deal with a "qualifying exigency" stemming from the fact that the employee's spouse, son, daughter, or parent has been called to active duty military service. (Note that this provision is limited to circumstances involving a family member in the National Guard, Reserves, or who is retired from the regular Armed Forces. It does not apply to family members who are serving in the regular Armed Forces.) Exigency leave acts as an additional qualifying reason for an employee to take his/her allotted 12 weeks of FMLA leave; it does not entitle an employee to an additional 12 weeks of leave. Qualifying exigencies include: short-notice of deployment, attending military events and activities, arranging alternative childcare, and receiving counseling.

Eligibility Requirements

Consecutive Employment. 29 C.F.R. § 825.110(b)(1)

The existing regulations provide that, for an employee to be eligible for FMLA leave, the employee must have been employed for at least 12 months. These 12 months do not have to be consecutive. Thus, an employee could potentially be eligible for FMLA leave if she worked for two months, had a 10-year break in service, and then worked 10 additional months. Under the new regulations, an employer does not have to count prior service if there has been a break in service of seven years or longer. There is an exception, however, for employees whose break in service is attributable to National Guard or military Reserve duties.

Counting Leave as FMLA leave when an employee becomes eligible during leave. 29 C.F.R. § 825.110

An employee may not be eligible to take FMLA leave at the start of leave if that employee has not met the 12-month length-of-service requirement. Because leave time counts towards the 12-month service requirement, however, it is possible for an employee to become FMLA eligible while already on leave. Under the current regulations, it was unclear whether or not an employer must designate the leave as FMLA leave at the point when an employee becomes eligible—especially considering that an employee's FMLA eligibility is determined at the start of a leave period. The new regulations make it clear that leave should be designated as FMLA leave as soon as the employee becomes eligible. Thus, it is possible that an employee's leave will be partially protected under the FMLA, even if it was not protected at its inception.

Intermittent Leave

Increments of Intermittent Leave. 29 C.F.R. §§ 825.20 and 825.205

Existing regulations require employers to account for intermittent leave in the smallest increments of time used by their payroll system, so long as the increment is an hour or less. The new rule states that an employer should use the smallest increment of time used to track other forms of leave, so long as that is no more than an hour. In other words, employers do not have to use very small increments of time simply because their payroll system is capable of tracking such small increments.

The new regulations also prohibit an employer from deducting time for which an employee was actually working from an employee's FMLA entitlement. For example, if an employee becomes ill 30 minutes before that employee is scheduled to leave for the day, an employer may not deduct an hour from FMLA leave entitlement, even if that employer uses one-hour increments in tracking other forms of leave.

Counting FMLA Leave

Treatment of Holidays. 29 C.F.R. § 825.200(h)

The new regulation reiterates DOL's position that whether or not a holiday occurs during a week taken as FMLA leave has no effect—the week is counted as a full week of FMLA leave. Where an employee is taking leave in increments of less than a week, however, the holiday counts against the 12-week leave entitlement only if the employee was required to work on that day.

Light Duty. 29 C.F.R. § 825.220(d)

Existing regulations state that when an employee accepts a light-duty assignment, the employee's restoration to the same position is available until "12 weeks have passed within the 12-month period, including all FMLA leave taken and the period of light duty." Some courts had interpreted this provision to mean that an employee could use up his or her 12-week FMLA leave entitlement while performing light duty and therefore lose his or her right to restoration. The new regulation makes it clear that time spent performing light duty neither counts against an employee's leave entitlement nor affects the right to restoration. Thus, an employee's right to restoration is essentially put on hold during the light-duty period. This right expires, however, at the end of the 12-month FMLA leave year.

Paid Leave

Enforcing the Terms and Conditions of an Employer's Paid Leave Policy. 29 C.F.R. § 825.207

FMLA leave is still unpaid leave. The regulations make it clear, however, that an employer can require employees to use paid leave concurrently with FMLA leave. In addition, an employee must follow an employer's paid leave policies to substitute paid leave for unpaid FMLA leave. For example, if an employer requires paid vacation to be taken in one-day increments, an employee using a paid vacation day while on FMLA leave would have no right to take less than the full day. Similarly, if an employer requires a certain amount of notice before an employee takes a paid-personal day, the employer can require the same notice be given before using the paid day while on FMLA leave.

Notice Requirements

Eligibility Notice Requirement. 29 C.F.R. § 825.300(b)

The new regulations require an employer to provide an employee requesting FMLA leave with "eligibility notice." This notice must inform the employee whether he or she meets the FMLA's eligibility criteria. This notice must be provided within five business days of the start of the FMLA leave. If an employee is not eligible, the notice must give the employee at least one reason for his or her ineligibility.

Rights and Responsibilities Notice Requirement. 29 C.F.R. § 825.300(c)

Employers must also provide an employee requesting leave with a "Rights and Responsibilities" notice explaining the employee's obligations and the consequences of a failure to meet such obligations. This notice must be provided within five business days and given each time the eligibility notice is provided.

Designation Notice Requirement. 29 C.F.R. § 825.300(d)

Employers now have five business days within which to notify employees whether the leave requested will be designated as FMLA leave.

Retroactive Designation of Leave. 29 C.F.R. § 825.301

Responding to the Supreme Court's decision in *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002), the new regulations allow an employer to retroactively designate leave as FMLA leave, provided this does not cause harm to the employee.

Employee must use normal Call-in Procedures. 29 C.F.R. § 825.302(d)

The new regulations make a notable change related to an employee's notice obligations in the event of an unforeseeable event triggering FMLA leave. While the existing regulations require an employee to give his or her employer notice "as soon as practicable," the new regulations require an employee to use the employer's normal call-in procedures absent extenuating circumstances.

Miscellaneous Issue

Perfect Attendance Awards. 29 C.F.R. § 825.215(c)(2)

The new regulations allow an employer to disqualify an employee who has taken FMLA leave from receiving a perfect attendance award, provided that the employer treats non-FMLA absences the same way.

Waiver and Release of FMLA claims. 29 C.F.R. § 825.220(d)

The new regulations allow an employee to voluntarily settle an FMLA claim, without court approval, based on past employer conduct. Employees cannot, however, waive their prospective rights under the FMLA.

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