

Untangling the Leave Laws' Web

*Presented by
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Wednesday, August 19

Revised FMLA Regulations

Now Effective

- The final regulations were issued on November 17, 2008
- They became effective on January 16, 2009
 - ❖ First revisions since the FMLA was enacted in 1993
 - ❖ Followed a Request for Information, issuance of proposed regulations, and comment period

Three Changes

- Creation of Military Caregiver Leave
 - ❖ Actually in effect since 2008
- Creation of Military Qualifying Exigency Leave
- Revisions to existing “traditional” FMLA regulations

Military Caregiver Leave

Military Caregiver Leave

- Provides up to 26 weeks of leave to an employee who is a:
 - ❖ Spouse
 - ❖ Son
 - ❖ Daughter
 - ❖ Parent
 - ❖ Next of kin
- of a covered servicemember with a serious injury or illness

Military Caregiver Leave

- Covered Servicemember
 - ❖ Member of the Armed Forces
 - Including National Guard or Reserves
 - ❖ Undergoing medical treatment, recuperation, or therapy; or
 - ❖ Otherwise in outpatient status; or
 - ❖ On the temporary disability retired list for a serious injury or illness

Military Caregiver Leave

- Serious injury or illness
 - ❖ One that was incurred by the servicemember in the **line of duty on active duty**
 - ❖ That may render the servicemember medically unfit to perform the duties of his or her:
 - Office,
 - Grade,
 - Rank, or
 - Rating

Military Caregiver Leave

- 26 weeks in a 12 month period
 - ❖ 12 month period begins on the first day the employee takes leave for this reason
 - ❖ Ends 12 months later
 - ❖ Regardless of the employer's method of measuring the 12 month period for other FMLA leaves
 - ❖ Employee is limited to 26 weeks for any FMLA-qualifying reason during the 12 month period (12 weeks may be for other reason)
 - ❖ ***12 weeks may run concurrently with CFRA

Military Caregiver Leave

- Spouses employed by the same employer are limited to a combined total of 26 weeks
- Leave may be taken intermittently
- Must give 30-day notice, or notice when “practicable”

Military Caregiver Leave

- Certification
 - ❖ Employer can require request for leave be supported by a certification
 - Completed by an authorized health care provider, or
 - By a copy of an Invitational Travel Order, or
 - Invitational Travel Authorization
 - ❖ Second and third opinions are not permitted
 - ❖ See Form WH 385

Qualifying Exigency Leave

Qualifying Exigency Leave

- Employers were “encouraged” to provide before the regulations were issued
- As of January 16, 2009, this leave is mandatory for FMLA covered employers

Qualifying Exigency Leave

- 12 weeks in a 12 month period
- Not in addition to regular FMLA leave
- Can be taken on a reduced hours/intermittent basis
- ***Does not run concurrently with CFRA
- ***This is *not* medical leave, it is *military exigency* leave

Qualifying Exigency Leave

- Definition of Covered Military Member
 - ❖ Employee's spouse, son, daughter, or parent
 - ❖ Who is a member of the National Guard or Reserves
 - ❖ Who is on active duty or call to active duty status in support of a contingency operation
 - ❖ NOT for families of servicemembers in the regular Armed Forces

Qualifying Exigency Leave

- Issues arising from military member's short notice deployment (seven days or less notice)
- Military events and related activities
- Childcare and related activities
- Financial and legal arrangements to address servicemember's absence
- Attending counseling
- Up to five days to spend time with a military member on short term, temporary rest and recuperation leave
- Attending post-deployment activities
- Any other activities agreed to by employer and employee

Qualifying Exigency Leave

- Leave may be taken intermittently
- Employee must give notice as soon as “practicable”

Qualifying Exigency Leave

- Certification
 - ❖ Employer may require that request be supported by a copy of the covered military member's active duty orders and
 - ❖ Certification providing appropriate facts related to the qualifying exigency, including contact information if it involves meeting with a third party
 - ❖ Second or third opinions are not permitted

Changes to "Traditional FMLA"

“Traditional” FMLA

- Focus on changes to “traditional” FMLA
- Effective January 16, 2009

FMLA - Covered

- Employees who have worked 12 months and 1,250 hours are entitled to 12 weeks of leave for qualifying reason
 - ❖ 12 months need not be consecutive – seven year look back (longer if break is for military service)
 - ❖ 1,250 hours are over 12 previous, consecutive months

FMLA Notice Requirements

- Consolidated in new regulations
 - ❖ General notice
 - ❖ Eligibility notice
 - ❖ Rights and responsibilities notice
 - ❖ Designation notice

FMLA Notice Requirements

- General Notice
 - ❖ May be posted electronically
 - ❖ Must be available to all employees and applicants
 - ❖ Must also be in a handbook, if employer has a handbook
 - If no handbook, must provide to employees upon hire

FMLA Notice Requirements

- Eligibility Notice
 - ❖ Must be provided to employee within five business days after request or need for leave is known

FMLA Notice Requirements

- Rights and Responsibilities Notice
 - ❖ Can be provided at same time as Eligibility Notice
 - ❖ Must inform employee of leave rights
 - Right to substitute paid leave
 - ❖ Must inform employee of responsibilities
 - Can require employees to follow regular call-in procedures
 - Advise employees if certification required

FMLA Notice Requirements

- Designation Notice
 - ❖ Must be given to employee within five business days after employer receives sufficient determination to make a decision
 - ❖ Valid for any leaves for the same reason in a 12 month period
 - ❖ If employer fails to timely designate, only liable for penalty if employee can show he or she suffered harm (*Ragsdale v. Wolverine World Wide, Inc.*)
 - ❖ Advise employee if fitness for duty certification will be required before reinstatement

FMLA – Employee Certification

- Employee has 15 days to complete
- If it is deficient, can notify employee
 - ❖ In writing
 - ❖ Give seven days to cure
- If not cured, employer (not employee's direct supervisor) can contact health care provider directly
 - ❖ For authentication or clarification
- Available at
 - ❖ <http://www.fehc.ca.gov/commission/forms.asp> (CA)
 - ❖ <http://www.dol.gov/library/forms/FormsByNum.asp> (Federal)
 - WH 380 E (employee leave), WH 380 F (family member leave), WH 384 (qualifying exigency), WH 385 (injured servicemember leave)

FMLA – Employee Certification

- Under FMLA, employer can ask for diagnosis of the serious health condition
 - ❖ CFRA regulations specify that employer *cannot* ask for diagnosis, but employee can provide diagnosis at his or her option
- Under FMLA, can require second or third opinion for certification of a family member's serious health condition
 - ❖ CFRA requires employer to accept employee's certification for a family member

Serious Health Condition

- Employees may use FMLA for period of incapacity or treatment of “chronic” serious health condition
- “Chronic”
 - ❖ Periodic visits for treatment = twice a year
 - ❖ Continues over a period of time
 - ❖ May cause episodic periods of incapacity

Serious Health Condition

- Incapacity
 - ❖ Three consecutive days of incapacity, plus two visits to a health care provider
 - Two visits must occur within 30 days of the beginning of the period of incapacity
 - First visit must take place within first seven days
 - ❖ Three consecutive days of incapacity, plus a regimen of continuing treatment
 - First visit within seven days
 - “Periodic visits” = two visits per year

Recertification

- 30 Day Rule
 - ❖ If the condition will last for more than 30 days, recertification can be no more often than every 30 days
- More than 30 Day Rule
 - ❖ If minimum duration is more than 30 days, employer must wait until specified period has passed to seek recertification (more than 30-day rule)
 - ❖ Exception -- employer may always request recertification every six months
- Annual Certification
 - ❖ Can request a new medical certification every year for conditions lasting longer than one year

Recertification

- Three exceptions to normal rules that allow employer to seek earlier recertification
 - ❖ The employee requests an extension of leave
 - ❖ The circumstances described by the previous certification have changed significantly
 - ❖ The employer receives information that casts doubt upon the employee's stated reason for the absence or the continuing validity of the certification

Fitness For Duty

- Can require FFD certification to address employee's ability to perform the essential functions of the position
- For intermittent leave, can require FFD up to once every 30 days if reasonable safety concerns exist

Bonuses

- Can now count FMLA absences towards “goals” for bonus, such as
 - ❖ Hours worked
 - ❖ Perfect attendance
 - ❖ Products sold
- No comparable provision in the CFRA

What Time Counts as FMLA

- Can count overtime hours not worked for FMLA reason as FMLA leave
- Cannot count hours worked on “light duty” as FMLA leave
- Employers may use time increment to record no greater than the shortest increment used to record other types of leave
 - ❖ Limited exception for physical impossibility (flight attendants)

Intermittent Leave

- When scheduling foreseeable leave on an intermittent basis, employee must make a “reasonable effort” to not unduly disrupt their employer’s operations
- This is the only change to the intermittent leave provisions, despite many comments to the DOL regarding intermittent leave
- The challenge remains regarding how to manage, track, and enforce intermittent leaves

ADA Amendments Act

ADA – Leave of Absence as a Reasonable Accommodation

- An employee may leave beyond the FMLA-mandated 12 weeks or beyond the company's internal leave maximum
- This may be required as a reasonable accommodation if the additional leave would not impose an undue hardship
- An employer may not apply a “no-fault” leave policy to deny additional leave to a disabled employee (unless it can show undue burden)
- If the employer determines that additional leave would constitute an undue burden, then it must see if it has a vacant, equivalent position for which the employee is qualified

ADA Amendments Act

- **Effective January 1, 2009**
 - ❖ On June 17, 2009, the EEOC voted to approve a proposed Notice of Proposed Rulemaking (NPRM) to conform its ADA regulations to the Amendments Act. The proposed NPRM is now sent for comment by other federal agencies pursuant to Executive Order 12067 and for approval by the Office of Management and Budget. When this process is completed, the EEOC will publish its NPRM for public comment.

ADA Amendments Act

Expands the definition of “major life activity” by including two “non-exhaustive” lists

- Activities that are major life activities, such as
 - ❖ Walking, reading, bending, and communicating
- Major bodily functions that are major life activities, such as
 - ❖ Functions of the immune system, normal cell growth, digestive, bladder, and bowel functions

Mitigating measures other than “ordinary eyeglasses or contact lenses” shall not be considered

- Impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active
- Individual subjected to an act prohibited under the ADA will meet the “regarded as” definition
- Emphasizes that disability should be interpreted broadly

ADA Amendments Act

- Reasonable accommodation
- The amendment emphasizes that individuals who are “regarded as” disabled are NOT entitled to reasonable accommodation

Practical Pointers

What Should You Do?

- Post new notices/posters
- Training
 - ❖ Refresher for employees on rights
 - ❖ Refresher for supervisors on how to handle leave requests
 - ❖ Special training for Human Resources on proper areas of inquiry
- Update handbook, certifications, notices
 - ❖ Watch for differences between state and federal law

What You Should Do?

- Communicate
 - ❖ Effective, interactive
- Understand employee and employer rights
- Be consistent
- Use tools available
 - ❖ DOL Web site
 - ❖ State Web sites
 - ❖ Published forms and notices

Questions?

Thank You.