Sweeping Changes to FMLA will bring employers a busy New Year

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The United States Department of Labor (DOL) issued final regulations to the Family and Medical Leave Act (FMLA) on November 17, 2008. The changes become law on January 16, 2009, giving employers two months to make all of the required changes. Employers will need to review policies and practices as well as obtain the new poster. The regulations made sweeping changes to the existing law and added an entirely new provision that applies to servicemembers. A summary of the changes is contained in this article. A complete copy of the comments and new regulations and forms can be found at http://edocket.access.gpo.gov/2008/pdf/E8-26577.pdf.

Joint Employers §825.106

Outside companies (Professional Employer Organizations) that contract with employers to provide human resource functions will not be considered joint employers unless the PEO has authority to hire, fire, assign or direct the employees or benefit from the work the employees perform.

Eligible Employee §825.110

If an employee has a break of employment for greater than seven years, the time spent does not have to be counted in determining if the employees has been employed for 12 months for purposes of determining eligibility. For military employees, leave taken due to military leave must be credited for purposes of the 12 months and 1,250 hours. If employee is not eligible for FMLA at the beginning of leave but qualifies during the leave, the FMLA will apply once eligibility requirements are met.

Serious Health Condition §825.115

The regulations clarify the definition of a serious health condition which involves two or more treatments by a health care provider. Now, the first medical treatment must occur within seven days of the first day of incapacity and the second treatment must occur within 30 days. At least one treatment must be in person.

In order for a condition to qualify as "chronic" the employee must visit a health care provider at least two times per year.

Leave for Pregnancy or Birth, Adoption or Foster Care §825.120 and 121

An expectant mother may take leave before the birth if her condition makes her unable to work. A husband may take leave to care for an expectant spouse if she is incapacitated. Only a spouse may receive FMLA leave to care for a pregnant woman.

Leave for Covered Servicemember §825.127

Employees can receive up to 26 weeks of leave in a single 12-month period to care for a covered servicemember who suffered an injury or illness during active military service. The employee must be the spouse, son, daughter, parent or next of kin. The 26 weeks is limited to one leave per injury. A new certification form was developed for the leave.

Leave for Qualifying Exigency §825.126

To qualify, the employee must be the spouse, parent, son or daughter of a covered military member. Military members are limited to those in the National Guard and Reserves on active duty or called to active duty by the federal government. Qualifying exigency includes short notice deployment, military events and related activities, childcare and school activities, financial or legal arrangements, counseling, rest and recuperation, post-deployment activities and other activities related to military duty. A form was created to request leave under this provision.

Calculation of Leave Time §825.200
Employers must divide the number of hours the employee was absent by the number of hours the employee would have worked in the week. If the employee has a variable work schedule, the rules require the employee to average the number of hours worked by the employee over the 12 months, not weeks, preceding the leave.

If the employee takes a full week of leave during a holiday week, the holiday counts as a day of FMLA leave. However, if the employees takes intermittent leave, the holiday is not counted unless the employee would have been scheduled to work the holiday.

Overtime may be counted for FMLA leave if the employee would be required to work the overtime hours but for FMLA.

Intermittent Leave §825.205
An employee who cannot work mandatory overtime can be charged FMLA leave for such overtime. An average workweek for an employee who works variable schedule must be calculated by averaging hours over the past 12 months, not past 12 weeks.

Substitution of Paid Leave §825.207
Employers are only required to allow employees to substitute paid leave if it is in accordance with policy. If the employer's policy does not allow paid leave for other unscheduled absences, the employer does not have to allow paid leave for unscheduled FMLA absences either.

Perfect attendance bonuses §825.215
Employers can now deny bonuses or other benefits to employees who do not meet attendance goals due to FMLA leave so long as the employer does not treat employees who take similar forms of leave more favorably than those who take FMLA leave.

Waiver/Settlements §825.220
Employees can now waive FMLA claims without court or DOL approval.

Light Duty §825.220
Employees who perform light-duty assignments are not considered to be on FMLA leave. Job restoration rights are tolled while the employees is on light duty.

Employer Notice Requirements §825.300
Employers now have four notice requirements: (1) general notice, (2) eligibility notice, (3) rights and responsibilities notice and (4) designation notice. The DOL amended the forms for the notices and amended the FMLA poster.

General notice

This notice must be provided to employees in a handbook or other written guidance. All new employees must receive a copy of this notice. If employers currently have an FMLA policy, the policy must be amended to include all information contained in this notice.

Eligibility/Rights and Responsibilities notice

The DOL combined these two notices onto one form. The notices inform employees of the eligibility requirements and whether employee is eligible for leave. The form must be given to employees within five days of when the employer receives notice of the need for leave. The rights and responsibilities notice informs employees about paid leave, health insurance, key employees and other matters.

Designation notice

The designation notice is new and must be provided to employees within five days of receiving sufficient information (usually a medical certification) to determine whether the leave qualifies as FMLA. Only one notice is required per applicable 12-month leave period.

Failure to designate leave properly §825.301
If an employee can demonstrate individualized harm due to an employer's failure to designate FMLA leave, the employee is entitled to damages such as lost wages or benefits.

Employee Notice Requirements §825.302
If employees fail to provide 30 days notice of the need for leave, employers can ask employees to explain why it was not practicable to provide notice sooner. Employers can delay or deny FMLA leave if employees do not follow policies such as call-in procedures absent unusual circumstances. Employees are also required to provide the qualifying reason for leave if the employer has previously provided leave for the same reason. Employees can be required to comply with usual and customary notice/procedural requirements including the requirement for an employee to request leave in writing. An employee who is seeking leave for a previously certified condition, must specifically reference the need for FMLA leave or previous condition.

Medical Certification §825.305-307
The Department of Labor developed two medical certification forms, one for an employee and one for a family member.

A request for medical certification must be made with five days of the notice for leave. Employers can request certification at a later date if there is reason to

question the appropriateness of the leave or duration. The certification must be complete and sufficient. If the certification is incomplete, the employer must notify the employee in writing what additional information is necessary and give the employee seven days to obtain the information.

Employers can also provide the essential job functions with the certification and ask the provider to identify what functions the employee cannot perform.

The new medical certification asks for specialization, medical facts regarding the condition and diagnosis and a certification that intermittent leave is medically necessary.

Authentication and Certification §825.307
If the certification is sufficient and complete, the employer cannot request additional information. The new rules permit either a health care provider on behalf of an employer, an HR professional, leave administrator or management official to contact the provider for authentication and clarification purposes after giving employees an opportunity to cure. The person contacting the provider may not be the direct supervisor. The employer must obtain a HIPAA compliant release. If an employee refuses to provide such a release, leave can be denied.

Recertification §825.308
If the minimum duration for a condition is greater than six months, the employer can request recertification every six months, in connection with an absence. Recertification can be requested sooner if the employee requests an extension of leave, circumstances have changed or employer receives information casting doubt on the validity of the certification. The employer may provide a record of absences to the healthcare provider and ask if the serious health condition is consistent with the pattern of absences.

Fitness for Duty §825.312
Employers can require that the fitness for duty certification address the essential job functions and whether the employee can perform those. For employees on intermittent leave, the employer can require a fitness for duty once every 30 days if reasonable safety concerns exist. Reasonable safety concerns means a reasonable belief of significant risk of harm to the employee or others. Employers cannot require second or third opinions on fitness for duty.