

December 19, 2008

## New FMLA Regulations and Employer Obligations Go Into Effect in January 2009

The Department of Labor recently issued new regulations under the Family and Medical Leave Act of 1993 (“FMLA”). The new regulations become effective on January 16, 2009. This client alert highlights some (but not all) of the changes made by the new regulations, including expanded notice requirements for employers. The new regulations also address for the first time the military-related leave provisions added to the FMLA in January 2008. Employers, working with their legal counsel, will want to review their existing FMLA policies and procedures to determine what changes are needed in light of the new FMLA regulations.

If you would like to visit the Department of Labor’s webpage devoted to the new regulations, please go to: <http://www.dol.gov/esa/whd/fmla/finalrule.htm>.

### Military-Related Leave

On January 28, 2008, President Bush signed into law the National Defense Authorization Act for Fiscal Year 2008, which amended the FMLA to provide for two new forms of leave for eligible employees — leave for an employee to care for a covered servicemember and leave for an employee to deal with certain military-related exigencies. Since the enactment of these new leave provisions almost a year ago, employers and practitioners have had many questions about how to interpret and implement them. The new regulations are the Department of Labor’s first attempt at answering some of these questions and provide employers with helpful and needed guidance.

#### A. *Leave to Care for a Covered Servicemember*

Leave to care for a covered servicemember is now probably the broadest of the leave provisions available under the FMLA. Under the new law, an employee who is the spouse, parent, child, or “next of kin” of a covered servicemember who incurs a serious injury or illness while on active duty is entitled to take up to 26 weeks of unpaid leave in a single 12-month period (beginning on the first day such leave is taken) to care for that servicemember. This portion of the new law became effective in January 2008 when it was passed. The new regulations make clear that this 26-week leave entitlement is inclusive of all FMLA leave taken by the employee during the applicable 12-month period and is not in addition to the 12 weeks of FMLA leave to which eligible employees were already entitled. However, an eligible employee is entitled to 26 weeks of leave for each servicemember and for each serious injury or illness incurred, so long as no more than 26 weeks of leave are taken in the applicable 12-month period.

#### B. *Exigent Circumstances Leave*

The new law also allows eligible employees to take up to 12 weeks of unpaid leave relating to “qualifying exigencies” when an employee’s spouse, parent, or child is on active duty or has been called to active duty with the military as a result of a “contingency operation.” This portion of the new law becomes effective on January 16, 2009, although employers have been encouraged to voluntarily comply since January 2008. Qualifying exigencies are new reasons for an

eligible employee to take up to 12 weeks of leave under the FMLA. It is *not* a right to take 12 weeks of leave in addition to the 12 weeks of FMLA leave to which eligible employees were already entitled. Also, the new regulations make clear that this exigent circumstances leave is not available if the employee's covered family member is a member of the regular armed forces. Rather, this leave is designed to assist employees whose family members are in the reserves or are retired, and who are suddenly called to active duty to assist with a contingency operation.

The new regulations provide eight different circumstances that will constitute a "qualifying exigency" for leave purposes, each of which are further defined and explained in the regulations: (1) short-term notice deployment; (2) military events and related activities; (3) childcare and school activities; (4) financial and legal arrangements; (5) counseling; (6) rest and recuperation; (7) post-deployment activities; and (8) additional activities agreed upon by the employer and the employee.

For both of these military-related leave provisions, the new regulations provide helpful definitions (such as for covered servicemember, next of kin, serious injury or illness, and qualifying exigency). These definitions, and other related rules (such as employee notification requirements and the employer's right to obtain a medical and/or call-to-duty certification), should be incorporated into employers' written FMLA policies.

### **Employer Notice Requirements**

Under the new regulations, employers are generally subject to four distinct FMLA notice requirements. Employers should review and update their FMLA notice procedures to ensure that they will be in compliance with the new regulations. The failure to comply with the notice requirements could provide an employee with a basis to collect monetary damages from the

employer or to seek equitable relief, such as a promotion or reinstatement to employment (for example, if the employee demonstrates that he or she suffered harm as a result of interference with his or her FMLA rights). In connection with issuing the new regulations, the Department of Labor also issued sample notices that employers can use (although the sample notices may need to be tailored to fit each employer's particular circumstances and needs). Note that, in addition to changing employers' notice obligations under the FMLA, the new regulations generally extend the time period in which the employer must provide the applicable notice to the employee.

#### *A. General Notice*

Employers are still required to post the general notice at a location where employees and applicants can see the notice. The general notice must also be included in an employer's employee handbook if the employer has one. If an employer does not have an employee handbook, then this general notice will need to be given to each new employee at the time he or she is hired.

#### *B. Eligibility Notice*

If an employee requests FMLA leave, or the employer has reason to believe that the employee's leave request may qualify for FMLA leave, the employer must provide the employee an "eligibility notice" within five business days (absent extenuating circumstances). As the name suggests, this notice informs the employee of whether he or she is eligible for FMLA leave. If the employee is not eligible for FMLA leave, this notice must explain why.

#### *C. Rights and Responsibilities Notice*

This notice would typically be provided to the employee at the same time that the employee is given the eligibility notice. This notice informs the employee about his or her rights and obligations with respect to taking FMLA leave, and what the consequences to him or her may be if the

employee does not fulfill those obligations. Some of the issues that this notice would address include: whether the employee will be required to provide a medical certification supporting the leave; whether the employee will be permitted or required to substitute paid leave and what rules apply to any such substitution (and a statement that unpaid FMLA leave will still be available if the employee chooses not to follow the rules for substituting paid leave); and how the employee's benefits will be treated during the FMLA leave.

#### *D. Designation Notice*

This notice informs the employee whether the requested leave will be treated as FMLA leave. If the leave will not be treated as FMLA leave, then this notice must explain why. The employer must provide this notice within five business days after it has sufficient information to determine whether the requested leave qualifies under the FMLA (which typically will not occur until the employer has received a properly completed medical certification form).

*Important Practice Point:* An employer who wants an employee to provide a fitness-for-duty certification when he or she returns from FMLA leave must include that requirement in this notice, as well as a list of the employee's essential job functions. The failure of the employer to do so will preclude the employer from requiring that the employee present such a certification when he or she returns to work. As a result, even though a fitness-for-duty certification is not needed until the employee's FMLA leave ends, it is a subject that the employer will need to consider and address at the time the leave is requested (if not sooner).

### **New Medical Certification Forms**

The new regulations include two new medical certification forms that employers can use in connection with an employee's request for FMLA leave. One form applies when the leave is for the employee's medical condition, and the other applies when the leave is for a family member's

medical condition. The new regulations also contain rules addressing how employers are to handle incomplete or insufficient certifications, as well as how and under what circumstances an employer can contact the employee's health care provider to clarify the certification. Employers continue to be subject to HIPAA and state laws that regulate access to medical records and other health information.

### **Substituting Paid Leave for FMLA Leave**

Before an employee is permitted to substitute his or her paid-time-off days (for example, vacation days) for unpaid FMLA leave, an employer may require the employee to follow the employer's rules for using such paid time off. For example, if an employer requires that an employee give at least one week of notice before using a vacation day, then the employee would need to comply with that same rule before he or she could use a paid vacation day to substitute for an unpaid day of FMLA leave. The use of paid leave runs concurrently with FMLA leave (in other words, the paid leave time counts against the employee's FMLA leave entitlement).

### **Definition of Serious Medical Condition**

One of the big complaints by employers related to the FMLA is that the definition of "serious medical condition" is too broad and can encompass illnesses like colds or the flu. The Department of Labor, to the dismay of most employers, did not address this issue in the new regulations (other than to acknowledge that this issue is a source of concern for many employers). However, the new regulations do clarify some related issues. A "serious health condition" includes a health condition that requires the individual to see his or her doctor two or more times. The new regulations provide that these two doctor visits must be within 30 days of each other and that the first visit must be in person. A "serious health condition" can also be a chronic medical condition that requires "periodic" doctor

visits. “Periodic” is now defined to mean two or more times per year.

### Intermittent Leave

One of the other biggest complaints by employers related to the FMLA is the obligation to allow eligible employees to use intermittent leave. As a result, some employers have had to grant FMLA leave in as small as six-minute increments. Keeping track of FMLA leave time used (and remaining leave time) for an entire workforce under such circumstances can be an administrative nightmare. The new regulations generally do not provide much relief for this intermittent leave issue. However, the new regulations do provide that an employer is only obligated to grant FMLA leave in the shortest increments that it uses to track other forms of leave, as long as that increment is not longer than an hour. For example, if an employer provides other leave in 30-minute increments, then it can grant FMLA leave in 30-minute increments, notwithstanding that it may be capable of doing so in smaller increments (for example, in six-minute increments).

The new regulations also make clear that, when scheduling intermittent leave (or reduced-schedule leave), the employee must use “reasonable efforts” to avoid scheduling the leave so as to disrupt the employer’s operations. However, if medical necessity requires that the leave be taken at a particular time, that need trumps this “reasonable effort” obligation.

### Other Provisions

The new regulations also address many other issues under the FMLA, a number of which may be of particular interest to employers, including:

The Department of Labor has made clear that employers and employees may, without obtaining the consent of the Department of Labor or a court, settle FMLA disputes. As a part of such settlement, the employee can agree to waive and release all

past FMLA rights and claims. The Fourth Circuit Court of Appeals had previously taken a contrary position. The new regulations continue to provide that an employee may not waive and release future FMLA rights or claims.

- If an employee’s health insurance coverage lapses while the employee is on FMLA leave because of the employee’s failure to pay his or her portion of the required insurance premium, the employer is nonetheless required to reinstate such health insurance coverage effective as of the date when the employee returns to work following FMLA leave. Before allowing an employee’s coverage to lapse under these circumstances, an employer will want to confirm that its health insurance policy will allow the employee to again become covered when he or she returns to work without any waiting period or other delay, or any preexisting condition limitations.
- In compliance with the Uniformed Services Employment and Reemployment Rights Act (USERRA), time spent by an employee fulfilling his or her military service obligations counts towards fulfilling the FMLA eligibility requirements, including for purposes of whether (i) the employee has worked at least 1,250 hours over the prior 12 months and (ii) the employee has been employed by the employer for at least 12 months.
- For purposes of determining employee eligibility for FMLA leave and whether an employer has the requisite number of employees within 75 miles of the “worksites,” the employee’s worksite is the employer’s office from which the employee is assigned or to which the employee reports. For an employee who telecommutes and works from home, his or her personal residence is not the “worksites.”
- Absent unusual circumstances, an employee can be required to comply with the employer’s usual and customary call-in procedures for providing

notice and requesting leave. If an employee fails to do so without justification, the employer may delay or deny FMLA leave.

- When FMLA leave is needed to care for a family member or covered servicemember, the eligible employee need not be the only family member or individual who is available to provide the needed care.
- Time during which an employee voluntarily works in a “light duty” position does not count against the employee’s FMLA leave entitlement, and the employee’s right to job restoration following the FMLA leave is held in abeyance during the “light duty” work period.

### What Should Employers Do Now?

Employers who are subject to the FMLA should take the following steps:

1. Review and update their FMLA policies in light of the new regulations.

2. Review and update their FMLA notice procedures.
3. Update their various FMLA notices.
4. Train their HR managers and other managers who may be responsible for responding to leave requests on the new FMLA rules.
5. Educate their workforce on the new FMLA rules.
6. Continue to be aware of and comply with any applicable state and local leave laws whose requirements differ from the FMLA’s requirements.

If you have any questions about the new FMLA regulations or need help complying with the new rules, please contact one of our employment and employee benefit partners listed below.

**Our client alerts are for general informational purposes and should not be regarded as legal advice. If you would like additional information or have any questions, please contact:**

David Gallai  
+1 (212) 408-1033  
[dgallai@chadbourne.com](mailto:dgallai@chadbourne.com)

Peter N. Hillman  
+1 (212) 408-1010  
[phillman@chadbourne.com](mailto:phillman@chadbourne.com)

Marjorie M. Glover  
+1 (212) 408-1016  
[mglover@chadbourne.com](mailto:mglover@chadbourne.com)

Edward P. Smith  
+1 (212) 408-5371  
[esmith@chadbourne.com](mailto:esmith@chadbourne.com)