

Labor and Employment E-news

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The Department of Labor Issues Final Rules on Revised FMLA Regulations - Rules will be Effective January 16, 2008

On November 17, 2008, the U.S Department of Labor ("DOL") published the long awaited final rules on the revised Family and Medical Leave Act ("FMLA") regulations. The final rules will take effect 60 days from publication, which is on January 16, 2009.

The FMLA final rules are generally consistent with the DOL's proposed rules issued in February 2008. (See Butzel Long's February 2008 e-alert on the proposed FMLA regulations at: <http://www.butzel.com/pdf/080219enLAB.pdf>). In addition, the FMLA final rules provide, for the first time, guidance on how to implement the FMLA's family military leave provisions.

FMLA Military Leave Provisions

- **Leave to Care for Injured Service Members:** This new FMLA provision, passed by Congress in January 2008, allows eligible employees who are the spouses, children, parents, or next of kin of a service member to take one leave of up to 26 weeks under the FMLA to care for a service member who incurred an injury during military service. The regulations provide guidance on when this leave is available and who may take leave. The regulations indicate that the DOL has interpreted the statutory provisions more broadly than many employers may have anticipated.
 - First, the term "next of kin," is broadly defined to include grandparents, aunts, uncles, first cousins, and any relative so designated by the service member – not just spouses, parents, and children.
 - Second, although the military caregiver leave can be taken only once per injury, more than one family member may qualify for it.
 - In addition, although the statute refers to a "one time" leave of up to 26 weeks, the FMLA final rules provide that military caregivers may take leave again if the service member incurs other injuries. The leave, however, is available only while the service member remains in the military.
- **Leave for Qualifying Exigencies:** This January FMLA amendment allows families of certain military personnel to take FMLA leave for "qualifying exigencies." The new FMLA rules define who is eligible for this type of leave and the very specific circumstances under which it is available.

- Significantly, this leave is only available to the covered family member of National Guard and Reserve personnel on active duty. This leave is NOT available to family members of active duty members of the Armed Forces.
- The rules define the “specific” and “exclusive” list of “qualifying exigencies” as: (1) short-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 where the employer and employee agree to the leave.

Additional Changes in the Final FMLA Regulations

While the FMLA final rules are consistent with the proposed regulations, the final rules do clarify certain changes and contain some additional modifications:

- **Notice of FMLA Absence:** In a change that will provide some relief to employers, the employees must follow their employer's call-in policies when they miss work for a FMLA-qualifying reason “absent unusual circumstances.” Currently, employees have up to two days after a business absence to notify the company about their need for leave. The rules also make clear that FMLA-protected leave may be delayed or denied when an employee does not comply with the employer's usual notice and procedural requirements and no unusual circumstances justify the failure to comply.
- **Chronic Conditions:** To establish a “chronic condition” for FMLA leave purposes, employees for the first time will have to certify that they visited a doctor at least twice a year for the condition.
- **Authentication and Clarification of Medical Certification:** In a provision supported by employers, the proposed regulations made clarification and authentication of an employee's medical certifications easier by allowing employers to contact healthcare providers directly for purposes of authenticating or clarifying a medical certification, eliminating the requirement that employers use an intermediary at this stage. However, in response to numerous comments, the DOL backed off that provision somewhat. The final regulations continue to allow employer contact with the healthcare provider, but now, to protect the employee's privacy, prohibit direct supervisors from obtaining an employee's medical information when a FMLA certification is needed.
- **Substitution of Paid Leave:** The regulations also provide more detailed guidance on the substitution of paid leave for FMLA leave. Significantly, employers must provide additional notice of the circumstances relating to the use of paid leave. The regulations do make clear that employers may require substitution of paid leave in the FMLA context to comply with employer leave policies. By way of example, the regulations state: “if an employer's paid personal leave policy requires two days' notice for the use of personal leave, an employee seeking to substitute paid personal leave for unpaid FMLA leave would need to provide two days' notice.” In addition, “where an employer's paid leave policy requires the use of such leave in an increment of time larger than the amount of FMLA leave requested by an employee, if the employee wishes to substitute paid leave for unpaid FMLA leave, the employee must take the larger increment of leave required under the paid leave policy unless the employer chooses to waive that requirement. The employer is not required to permit the employee to substitute paid leave for the smaller increment of unpaid FMLA leave.”

- **Perfect Attendance Awards:** The final rules allow employers to deny a “perfect attendance” award to an employee who does not have perfect attendance because of the employee’s FMLA leave. However, the employer must treat employees taking non-FMLA leave in an identical way to deny the award because of a FMLA leave.
- **Return to Work Certification:** The final regulations allow the employer to require that an employee returning from an FMLA leave obtain a certification from the healthcare provider that the employee is able to resume work. However, the final regulations now provide that if the employer is going to require a fitness-for-duty certification prior to returning the employee to work, the employer must provide notice of this requirement no later than in the FMLA Designation Notice and indicate in the Designation Notice whether certification must address the employee’s ability to perform the essential functions of the employee’s job. In addition, the final regulations provide that employers may require fitness-for-duty tests for employees returning from intermittent FMLA leave if doing the job raises a significant risk of harm to themselves or others.
- **FMLA Forms:** In addition to the modified Medical Certification Form, the final rules also contain a modified FMLA Designation Form to notify employees of time designated as FMLA. The final rules contain a new requirement that the employer notify the employee if the information provided in the designation notice changes (e.g., if the employee exhausts the FMLA leave entitlement).

What Should Employers Do Now:

- Review the FMLA regulations and modify FMLA policies and notices as well as other leave policies by January 16, 2008 to comply with the new regulations.
- Train HR professionals and managers about the FMLA regulations. Advise employees of the new provisions and post the revised DOL Notice.
- Focus on reviewing and, if necessary, updating job descriptions that describe essential job functions, which will likely take on increased importance in the initial certification and fitness-for-duty process.
- Contact your Butzel Long attorney with any questions that you may have regarding the regulations, the military family amendments, and related policy revisions.
- Watch for information on Butzel Long’s upcoming Briefings on the new FMLA regulations.

If you have any questions regarding the Family and Medical Leave Act or the FMLA final regulations, please contact the author of this E-News bulletin as indicated below or your Butzel Long attorney.

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