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Top Ten Actions that an Employer Should Take to Comply with the Revised FMLA Regulations

Effective January 16, 2009, the Department of Labor's revised regulations for the Family and Medical Leave Act, which applies to employers with at least 50 employees, will become effective. These regulations will both change numerous parts of the current regulations, which have been in effect since the mid-1990s, and include provisions about the entitlements to military family leave that were enacted in 2008.

For an employer, the question is what needs to be done to comply with the revised FMLA regulations? This article summarizes the top ten actions that an employer should take.

First, a new "General Notice," which the DOL has prepared, will have to be posted. This new "General Notice" will replace the current FMLA poster that employers now post. The revised regulations also permit the electronic distribution of the "General Notice." Under the revised regulations, an employer will also have to issue the "General Notice" to each newly hired employee or, alternatively, to include it in its employee handbook. Including the "General Notice" in an employee handbook is not recommended, contrary to the DOL's suggestion that employers can or should do it.

Second, and most importantly, an employer will need to revise its current FMLA policy, which, by regulation, must be included in its employee handbook. Information about the two kinds of military family leave---leave for a "qualifying exigency" and leave to care for a service member---must be included in an FMLA policy. In addition, the current FMLA policy must be reviewed and rewritten to incorporate the various changes reflected in the revised regulations. An employer will also have to distribute its revised FMLA policy to its employees.

Third, in addition to posting the new "General Notice," an employer should implement the DOL's new medical certification forms for different situations: employee's serious health condition (WH-380E); family member's serious health condition (WH-380F); and covered service member's serious injury or illness. There is also a certification form for a "qualifying exigency" for a military family leave (WH-382).

Fourth, an employer has the right to attach an employee's job description or a list of an employee's essential job functions to a medical certification and to require the employee's health care provider to state what essential job functions cannot be performed by the employee as a result of the

employee's "serious health condition." An employer accordingly should ensure that it has either written job descriptions that list essential job functions or a list of essential job functions.

Fifth, the revised regulations permit an employer to insist that a medical certification is complete and sufficient. Under the current regulations, incomplete, vague, or sketchy certifications from health care providers are a common problem. An employer should develop a form that will notify an employee's health care provider about an "incomplete" or "insufficient" certification. The DOL has not published a prototype form for this purpose.

Sixth, an employer will need to implement the DOL's new "Notice of Eligibility and Rights & Responsibilities" (WH-381) and "Designation Notice to Employee of FMLA Leave" (WH-382). If an employer will require, at the end of an FMLA leave, a fitness-for-duty certification that states the employee's ability to perform the essential job functions of the employee's position, then the employer must notify the employee of that requirement in the "Designation Notice" and also attach a job description or a list of essential job functions to the "Designation Notice."

Seventh, an employer should develop a fitness for duty certification form that will specifically elicit an answer to the question of whether the employee can perform the essential job functions. The DOL has not published a prototype form on this issue.

Eighth, an employer should review its attendance, other leave of absence, and paid time off (vacation, sick time, PTO) policies to ensure that there is consistency between those policies and the FMLA policy and that the employer can maximize the use of its rights under the revised FMLA regulations.

Ninth, an employer should review its attendance award and other bonus programs or, alternatively, evaluate whether to implement those kinds of programs. That is because the revised FMLA regulations eliminate the requirement that FMLA absences must be counted as non-absences for the purpose of perfect attendance awards and for other bonuses that are based on the achievement of a specified goal, as long as it similarly treats paid vacation and other paid absences.

Tenth, and importantly, an employer needs to train its human resources staff and any supervisors and managers about the revised FMLA regulations and how to administer the employer's FMLA policy and procedures in order to comply with the revised 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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