

# THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

## CivilLITIGATION

# Employer update 2009: Huge changes for the FMLA

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Last month, after years of promising to revise regulations within the Family and Medical Leave Act of 1993 (FMLA), the U.S. Department of Labor finally did just that.

As of Jan. 16, 2009, all FMLA-eligible employers in the U.S. must begin complying with the new regulations.

President Bush on Jan. 28 signed legislation amending the FMLA to allow eligible employees to take two new types of FMLA-qualifying leave related to military service — qualifying exigency leave and military caregiver leave. The legislation also granted the DOL authority to issue regulations concerning those types of leave. One of the most significant changes to the Act is the guidance concerning the military leave provisions.

“Qualifying exigency leave” only is provided for family members of servicemembers in the reserve components of the military — not for servicemembers in the regular armed forces. The regulations identify eight distinct types of qualifying exigencies — leave due to a short-notice deployment, when a servicemember is called to active duty with seven or fewer days’ notice; leave to attend military events and activities related to a servicemember’s active duty service; leave to arrange for childcare, provide childcare on an urgent basis, enroll a servicemember’s child in school and attend the child’s school activities; leave to make financial and legal arrangements for the servicemember while on active duty; leave to attend counseling for the servicemember, the employee or the servicemember’s child because of a mental or physical disability; leave for rest and recuperation while the servicemember is home for a short-term, temporary or recuperative leave; leave to attend post-deployment activities and leave for other, unspecified activities arising from a servicemember’s active duty or call to active duty, which the employer and employee agree are exigent.

Employers must begin to provide leave due to a qualifying exigency no later than Jan. 16, 2009, and should review carefully the extensive regulations concerning each of the new leave types.

The regulations grant leave to certain family members to care for a covered servicemember with a serious injury or illness for up to 26 workweeks under the “military caregiver leave.” A seri-

ous injury or illness is defined as that “incurred by a covered 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.”

Unlike other forms of FMLA leave, military caregiver leave may be taken by an employee who is a servicemember’s spouse, child, parent or next of kin. Unlike qualifying exigency leave, military caregiver leave may be taken by qualifying family members of servicemembers in the reserves or in the regular armed forces.

In addition to new regulations concerning military-related leave, the revised FMLA now also addresses other, numerous issues in effect since August 1993. While the modifications are too numerous and extensive to detail here, some of the most important changes include:

- Clarification of the the various categories of continuing treatment for purposes of determining whether an employee has a serious health condition;

- Modifications to the regulations concerning leave for pregnancy or childbirth to reflect that leave to care for the pregnant woman only is available to the woman and her spouse, not to her boyfriend or fiancé;

- Clarification that a health care provider, which now includes physicians’ assistants, must identify any and all essential job functions the employee is unable to perform due to the employee’s own serious health condition. The Act also permits (but does not require) employers to provide a list of an employee’s essential job functions when requesting the medical certification.

- The new regulations allow employers to impose company-specific leave policies when employees wish to substitute paid leave for unpaid FMLA leave; therefore, when an employer requires a specified period of notice before use of personal leave or vacation time, an employee must provide sufficient notice of his or her intent to use such time.

- Employers may count paid disability leave against an employee’s FMLA leave entitlement as long as it is taken for an FMLA-qualifying reason, and also may use an employee’s

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accrued paid time off to supplement the disability payments as long as the employer and employee agree to such an arrangement. The rule also applies to employees who are receiving workers' compensation, where permitted under state law.

- The new regulations require employers to notify employees whether a leave of absence is being designated as FMLA leave within five business days (formerly two days).

- Numerous changes were made concerning the medical certification process, including the fact that an employer (i.e., a human resources representative, leave administrator or manager) now may contact an employee's medical professional directly to seek clarification of an employee's medical certification.

- Employers now may require a fitness-for-duty statement that details an employee's ability to perform his or her essential job duties, before the employee returns to his or her position at the conclusion FMLA leave.

The DOL's new FMLA regulations also provide six sample forms and notices for employers — a new health care provider

certification form; a general notice to employees of their rights under the FMLA; a notice to employees of their eligibility, rights and responsibilities under the FMLA; a sample designation notice to an employee on leave; a certification of a qualifying exigency military family leave and a certification of serious injury or illness of a covered servicemember for military family leave.

While employers are not required to use those forms or notices, compliance with the FMLA is much easier to demonstrate through the use of DOL-provided model forms and notices.

It is important for employers to re-examine and revise their FMLA-related policies and practices to ensure immediate compliance with the changes, especially concerning military leave provisions that likely are not even included in most employers' current FMLA policies. By performing the work now, you could save yourself and your business from FMLA headaches and litigation in the future.

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