

Summary of New Regulations on Family & Medical Leave Effective in January 2009

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by Stacy A. Hickox, JD, Assistant Professor
Michigan State University, School of Labor and Industrial Relations

The new regulations interpreting the Family and Medical Leave Act (FMLA) have been posted by the Department of Labor and will become effective on January 16, 2009. This article summarizes some of the most significant changes. The regulations discussed here affect employee eligibility, the definition of a qualifying exigency, who can take leave to care for a military service member, and changes in notification requirements for both employees and employers. Please note that this is not an exhaustive review of all the changes presented in the regulations.

Employee Eligibility

The rule that an eligible employee must have been employed for a total of at least 12 months with their current employer has been clarified. The 12 months of employment need not be continuous, but an employee generally cannot rely on employment prior to a break in service to the employer of 7 years or more.¹ Thus, an employer would not need to look back more than 7 years to determine if the employee has at least 12 months of service with that employer. However, an employer can choose to consider more remote employment, if it does so consistently.

An employee seeking FMLA leave, based on treatment from a health care provider associated with an incapacity of more than three days, must visit and receive treatment from a health care provider. The regulations clarify that such “treatment” means an in-person visit, not just a phone call or e-mail. That first visit must take place within seven days of the first day of her incapacity. The regulations also clarify that if the qualifying event is based on two visits to a health care provider, the two visits must occur within 30 days of the first day of incapacity, unless extenuating circumstances exist.

To take leave for a chronic condition, an employee must receive “periodic visits” for treatment by a health care provider. The new regulations require at least two visits per year to qualify as a chronic condition.

¹ Two exceptions for the 7 year limitation on a break in service are also included: an employee’s break for fulfillment of National Guard or Reserve military service, or where an agreement exists concerning an employer’s intention to rehire the employee.

Qualifying Exigency

Up to 12 weeks of leave can be taken for a “qualifying exigency” associated with the active duty of a family member in the National Guard or Reserves. The 8 exigencies listed in the regulations are as follows:

- 1) After up to 7 day notice of deployment – up to 7 days from date of notice
- 2) Military events and related activities – military ceremony or program, or family support and assistance programs
- 3) Childcare and school activities – care or activities of child of military member
- 4) Financial and legal arrangements for the military member; e.g., preparing power of attorney
- 5) Counseling for employee, military member, or child of military member
- 6) Rest and recuperation with military member – up to 5 days for each instance
- 7) Post-deployment activities – military ceremony or program within 90 days of return or in case of death of military member
- 8) Additional activities related to call up - as agreed by employee and employer

Care for Service Member

The FMLA also provides for one period of up to 26 weeks of leave to care for a spouse, child (of any age),² parent or next of kin who is a **covered service member**,³ which means a current member of the armed forces (including the National Guard or reserves) who returns with serious injury or illness that was incurred in the line of duty while on active duty. The service member must be unfit to perform her duties and undergoing medical treatment,⁴ recuperation, or therapy, otherwise on outpatient status, or be otherwise on the temporary disability retired list.

To interpret the eligibility for up to 26 weeks of leave to care for an injured covered service member, “**next of kin**” is defined as the nearest blood relative, beyond the service member’s spouse, parent or child, in the following order of priority: blood relative with legal custody, siblings, grandparents, aunts and uncles, first cousins.

² Id.

³ This has been interpreted by the DOL to exclude retired or discharged military service members.

⁴ The treatment need not be provided by a Department of Defense (DOD) health care provider.

Employee Notification of Need for Leave

In addition to giving notice to an employer at least 30 days prior to the need for leave if such notice is practicable, an employee now must respond to an employer's request to explain why at least 30 days notice was not practicable.

The requirement that notice be given "as soon as practicable," has been defined as "as soon as both possible and practical," given the individual facts and circumstances. The 1-2 day time frame has been eliminated. The new regulations state that once the employee becomes aware of need for leave, it should be practicable to give notice that same day or the next business day.

Absent unusual circumstances that prevent an employee from compliance, an employee may be required to comply with an employer's more stringent policies regarding requesting leave, so long as that policy does not require notice before notice is practicable. The new regulations also state that an employer's policies are one way to determine when notice of an unexpected need for leave would be "practicable."

Notices to Employees

An employer now has five (rather than two) business days to provide an eligibility notice to an employee seeking leave.⁵ This notice must be provided at the beginning of the first period of FMLA leave in a given leave year. If the employee seeks a second leave later in that leave year, the employer need only provide notice (again within 5 business days) if the employee has become ineligible. The employer's response to a request for FMLA leave must include a statement as to whether eligibility requirements are met, and must include at least one reason why the employee is ineligible.

An employer now has five (rather than two) business days from the date of a request for leave in which to ask for medical certification. If the certification is incomplete or insufficient, the employee must be given a written statement as to what additional information is needed, and seven days in which to provide that information.

The new regulations include additional requirements for employer notices to employees seeking FMLA leave, as well as clarification on the certification of need for leave (including different certifications for service members), fitness for duty certifications, calculation of leave, and the right of an employer to contact a health care provider directly for clarification and authentication.

The full text of the amendments can be read and downloaded at the GPO Access web site, <http://frwebgate.access.gpo.gov/cgi-bin/multidb.cgi>.

⁵ This time period begins at the time the employee requests leave or when the employer acquires knowledge that the employee's leave may be for an FMLA-qualifying reason.

