



Employee Benefits Circular ————— February, 2008

SIGNIFICANT CHANGES IN FAMILY MEDICAL LEAVE ACT (FMLA) TO REQUIRE PROMPT ATTENTION TO EMPLOYER LEAVE AND BENEFITS POLICIES

The Family Medical Leave Act, which impacts an estimated 95.8 million workers in the United States, recently underwent perhaps its most significant period of change since enactment 15 years ago. After roughly 15 years of relative regulatory inaction, two events in the past few weeks have refocused attention on the FMLA regulatory scheme, and will likely require employers to revisit their FMLA administrative processes.

WHAT ARE THE CHANGES?

I. New Leave Rights Related to Military Service – The Most Significant Expansion of FMLA Rights since Enactment

On January 28, 2008, President Bush signed into law H.R. 4986, the “National Defense Authorization Act for FY 2008” (NDAA). Section 585(a) of the NDAA amended FMLA to provide two new leave entitlements related to military service by an eligible employee or a close relative. Specifically, the NDAA creates:

- (1) A new fifth category was added to the standard entitlement provisions of FMLA Section 102(a)(1). Eligible employees will soon be eligible to take up to 12 weeks of FMLA-protected leave for “*qualifying exigencies*” arising out of a covered family member’s active military duty in support of a contingency operation. *See*, FMLA, Section 102(a)(1)(E); 29 U.S.C. 2612(a)(1)(E).
- (2) An entirely new category of up to 6 months (26 weeks) of FMLA-protected leave in a single 12-month period to care for a spouse, son, daughter, parent, or other yet-to-be-defined close blood relative who is recovering from a serious illness or injury incurred in the line of duty during active service with the armed forces of the United States, including the National Guard and Reserves. *See*, FMLA, Section 102(a)(3).

While at first glance these two new leave entitlements may appear to be merely an add-on to the presently existing statutory structure, they are actually a significant departure, and will likely present challenging administrative issues. There are a number of issues where U.S. Department of Labor (“DOL”) guidance will be required. To make matters worse,

as discussed below in the section “WHEN ARE THESE CHANGES EFFECTIVE?”, entitlement to 26 weeks leave for recovery from injury or illness under the new Section 102(a)(3) is effective immediately; before many of these issues have been worked out.

As stated, the DOL is presently seeking comments and will soon issue further guidance on a number of issues, including:

- *Definition of “Qualifying Exigency”*: In general, a situation is “exigent” when “requiring immediate aid or action.” While the DOL is currently drafting regulations to define a “qualifying exigency,” employers should assume that whatever final regulations eventually result will be relatively broad, and will presumably include time spent caring for the child(ren) of a son, daughter, parent or other “next of kin” who has been called to active duty in the armed forces or has been notified of an impending call. The DOL has stated that it will “undertake to implement the new military family leave provisions so as to maximize the benefits and minimize the burdens on both employees and employers consistent with the purposes of the FMLA.” Could a “qualifying exigency” expand as far leave required to sell a house, enroll a child in school or relocate one or more family member? It is difficult to see how the DOL is going to limit which results of military service are “exigent”? At present, it is best to be permissive regarding “qualifying exigencies” where they apply.¹
- *Definition of “Next of Kin”*: While the NDAA defines “next of kin” as “the nearest blood relative of that individual.” The DOL is seeking comments on this definition and will publish further guidance. Until that point, however, employers will need to make some good faith interpretation on their own since the term is used in the immediately effective 26-week entitlement mandate.

¹ Clearly, Congress intended the statute to be interpreted broadly in order to favor servicemembers and their families. Representative Jason Altmire, who introduced this provision, made the following statements on the House Floor regarding leave taken for a “*qualifying exigency*”: “This amendment allows the immediate family of military personnel to use Family Medical Leave Act time for issues directly arising from deployment and extended deployments. The wife of a recently deployed military servicemember could use the Family and Medical Leave Act to arrange for childcare. The husband of a servicemember could use the Family Medical Leave Act to attend predeployment briefings and family support sessions. The parents of a deployed servicemember could take Family Medical Leave Act time to see their raised child off or welcome them back home. This amendment does not expand eligibility to employees not already covered by the Family Medical Leave Act. . . It will allow military families to use family and medical leave time to manage issues such as childcare and financial planning that arise as a result of the deployment of an immediate family member.” 153 Cong. Rec. H5258 (daily ed. May 16, 2007); 153 Cong. Rec. H15325 (daily ed. Dec. 12, 2007); 153 Cong. Rec. H15349 (daily ed. Dec. 12, 2007) (statements of Representative Altmire).

The Department of Defense generally considers the following individuals “next of kin” of a servicemember in the following order: (1) Unremarried surviving spouse; (2) natural and adopted children; (3) parents; (4) remarried surviving spouses (except those who obtained a divorce from the servicemember or who remarried before a finding of death by the military); (4) blood or adoptive relatives who have been granted legal custody of the servicemember by court decree or statutory provisions; (5) brothers or sisters; (6) grandparents; (7) other relatives of legal age in order of relationship to the individual according to civil laws; and (8) persons standing *in loco parentis* to the servicemember. Use of the DOD definition would almost certainly meet the good faith compliance standard.

- *One Time Entitlement or Multiple Events:* The requirement to permit eligible employees 26 weeks of FMLA-protected leave to assist in recovery from injury or illness is specifically limited by the statute to “only be available during a single 12-month period.” The DOL is considering whether this statutory language applies to vis-à-vis the eligible employee or the injured servicemember. Said differently, whether the eligible employee is limited to a one-time entitlement or whether the statute permits an eligible employee to take another 26-week entitlement if necessary to care for a different covered servicemembers.
- *Unintended divergences:* The DOL will also need to consider the effect of the following:
 - (1) NDAA does not alter the current FMLA definition of “son or daughter.” Thus, from a purely technical view, the only sons or daughters who will be eligible to take FMLA-protected under either the exigencies provision or the caretaking provision to care for a parent or assist a parent with a “qualifying exigency” will be those sons or daughters who are under the age of 18, or age 18 or older and incapable of self care because of a mental or physical disability. This is clearly not what the statute intended.
 - (2) The 26-week caretaker entitlement has potentially a significantly broader reach than does the 12-week “exigency” provision. By the terms of the statute, leave to resolve a “qualifying exigency” is only available where the servicemember is called up on a “contingency operation.” In contrast, leave to care for a covered servicemember injured in the line of duty may be available regardless of when the servicemember is injured and regardless of whether or not the servicemember was in any supporting a “Contingency Operation.”²

² Under 10 U.S.C. § 101(a)(13), a “Contingency Operation” is defined as a military operation that is (1) designated by the Secretary of Defense as an operation in which members of the Armed Forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing force; or (2) recognized by law as existing if the military operation results in the (1)

- (3) Finally, the definition of servicemembers covered under the new FMLA leave provisions appears to be different, and slightly narrower, than the definition used under the Uniformed Services Employment and Reemployment Rights Act (USERRA). Specifically, the NDAA makes reference to a “member of the Armed Forces, including a member of the National Guard or Reserves,” but omits reference to members of the “the commissioned corps of the Public Health Service, and any other category of persons designated by the President in time of war or national emergency,” all of whom are covered under USERRA. The term “Armed Forces” is not defined under NDAA, and the DOL may well wish to interpret this term in such a way as to match those individuals covered under USERRA. While this discrepancy does not present a technical problem or inconsistency, existence of different covered groups could lead to confusion and administrative difficulties on the part of employers and employees.

At present it appears that the substitution of paid leave and other notice requirements will generally apply to the new Military leave periods in the same manner as they do to other qualifying entitlements for FMLA leave.

II. Proposed Revisions to General FMLA Regulations

In addition to the new rights and duties enacted under the NDAA, the DOL has also recently published a “Notice of Proposed Rulemaking and Request for Comments,” effectively updating the Proposed Regulations previously issued with regard to FMLA. On Monday, February 11, 2008, the DOL proposed a significant number of revisions with the intent of updating and clarifying the existing proposed regulations.

The agency’s revised proposals do not make significant changes or produce a radical overhaul of FMLA’s administrative requirements (as some had hoped / feared). Rather, they tweak several areas in response to issues that the DOL noted, various court decisions, and to some 15,000 comments submitted in response to a request for information issued last year. While employers who were expecting significant revisions did not get the guidance they had hoped for, there are a number of proposed changes that do merit employer attention.

A. Clarification of definitions and concepts:

call-up to (or retention on) active duty of members of the uniformed Services under certain Enumerated Statutes (10 USC Sections 688, 12301(a), 12302, 12304, 12305, 12406, or 331-335) or the call-up to (or retention on) active duty of members of the uniformed Services under other (non-enumerated) statutes during war or national emergency declared by the President or Congress. *See*, 10 U.S.C. § 101 (a)(13)(B).

- Definition of Serious Health Condition – The new rules do not change the definition of a “serious health condition,” but they do impose defined time limits on required visits to a health care provider. Specifically, the proposed rule retains the existing individual definitions of “serious health condition” while adding guidance on two regulatory terms: (1) “two visits to a health care provider” and (2) “periodic visits.” A serious health condition can be proven by a showing of three consecutive calendar days of incapacity plus “two visits to a health care provider.” Because the rule prior to revision was open-ended, the proposed rule would mandate that the two required visits occur within 30 days of the period of incapacity. Secondly, the proposed rule defines “periodic visits” for chronic serious health conditions as at least two visits to a health care provider per year. Before the proposed rule, the term “periodic visits” was not well defined.
- Clarification of Joint Work Status (PEOs) – The proposed rule clarifies its interpretation of the impact of a past DOL interpretation from 2000. Specifically, the proposed rule provides that Professional Employer Organizations (PEOs) that perform limited services and administrative functions for their client companies, such as payroll, benefits or regulatory paperwork are not joint employers and are not responsible for complying with many of the provisions of FMLA. These PEOs will, of course still need to administer those FMLA requirements that impact their duties on behalf of clients, such as client benefits and payroll. On the other hand, if in a particular fact situation, a PEO has the right to hire, fire, assign, or direct and control the employees, or benefits from the work that the employees perform, such a PEO would be a joint employer with the client company and will incur greater responsibility for FMLA requirements.
- Clarification on Holidays – The Proposed rule clarifies that if an employee needs less than a full week of FMLA leave, and a holiday falls within the partial week of leave, the hours that the employee does not work on the holiday cannot be counted against the employee’s FMLA leave entitlement if the employee would not otherwise have been required to report for work on that day. If an employee needs a full week of leave in a week with a holiday, however, the hours the employee does not work on the holiday will count against the employee’s FMLA entitlement.
- Intermittent Leave Rule – Calculation – The proposal does not amend the minimum increment for intermittent leave, which can be a few hours, but it does require employees to notify employers of an FMLA absence “prior to the start of their shift.”
- Clarification on substitution of Paid Leave – The proposed rule requires that substitution of accrued paid leave be allowed on the same terms and conditions,

regardless of the employer's classification of that paid leave. Accordingly, under the proposed rule, the employee may elect to utilize accrued paid vacation, personal leave, PTO or other paid time off, provided that the employee has met the terms and conditions of the employer's paid leave policy.

- Clarification on Light Duty – The proposed rule clarifies that time spent performing “light duty” work does not count against an employee's FMLA leave entitlement. If an employee is voluntarily performing a light duty assignment, the employee is not on FMLA leave.

B. Notice and Notification Revisions:

FMLA imposes notice requirements on both employers and eligible employees. The proposed regulations consolidate all employer notice requirements into a “one-stop” section of the regulations. Significant revisions include:

- Employer Notice –The proposal imposes increased notice requirements on employers in order to better enable employees to know and understand their FMLA rights. Employers now have to provide more information when employees request leave and when an employer designates time off as FMLA leave. Further, the time limit for providing this information has been extended from two business days to five.
- Employee Notice – The proposed rule recognizes that lack of advance notice for unscheduled absences causes disruption in employer functions, and represents one of the most significant unintended consequences of the current regulations. The proposed rule provides that in most cases an employee needing FMLA leave must follow the employer's usual and customary call-in procedures for reporting an absence absent unusual circumstances. The proposal also highlights (without changing) the existing consequences if an employee does not provide proper notice of his or her need for FMLA leave (*e.g.*, if the employee could have followed the employer's rules but didn't, FMLA leave can be delayed or denied).

C. Changes regarding Medical Information, Certification and Recertification

- Medical Certification Process – Incomplete Certifications – The proposed rule specifies that if an employer determines that a medical certification is incomplete or insufficient, the employer must tell the employee, in writing, what further information is necessary and give the employee at least seven calendar days to obtain the information and correct any relevant problems.
- Contacts with Medical Providers – Under the proposed rule, employers will be allowed to contact health care providers directly to clarify and authenticate

certifications. Please note however, that HIPAA's privacy rules will still apply and some medical providers may still refuse to discuss individual health information without a HIPAA-compliant authorization.

- Recertification – The proposed rule would formalize a 2005 Wage and Hour Opinion letter stating that employers may request a new medical certification each leave year for medical conditions that last longer than one year. The proposal also would allow employers to request recertification of an ongoing condition at least every six months in conjunction with an absence, even where the duration of a condition is described as “lifetime” or “unknown.”
- Fitness-For-Duty Certifications – The proposed rule makes two changes to the fitness-for-duty certification process. First, an employer may require that the certification address the employee's ability to perform the essential functions of the employee's job. Second, where reasonable job safety concerns exist, an employer may require a fitness-for-duty certification before an employee may return to work when the employee takes intermittent leave.

D. Other / Miscellaneous Guidance

- Waiver of Claims / Settlement of Claims without court approval – As a result of certain court decisions bringing into question whether FMLA rights may be waived in the process of a settlement of a claim, the proposed rule reiterates the DOL's standing position that employees may voluntarily settle FMLA claims without court or Department approval. The proposed rule retains, however, the prior rule that FMLA rights may not be waived prospectively.
- Penalties – The proposed rule removes certain categorical penalty provisions, but clarifies that where an employee suffers individualized harm because an employer failed to follow certain notification rules, the employer may be held liable.
- Perfect Attendance Awards – The proposed rule clarifies that time spent on FMLA-covered leave is not required to be credited when considering whether an employee qualifies for a perfect attendance award or similar recognition.

While the new Proposed Regulations have been considered to be generally employer-friendly, and may make FMLA administration easier for many employers, they are by no means the final word on the subject. Congress planned to review the proposed regulations, with the Children and Families Subcommittee of the Senate Health, Education, Labor and Pensions (HELP) Committee holding preliminary hearings on February 13, 2008 and the House Education and Labor Committee's Workforce Protections Subcommittee holding hearings the next day.

WHEN ARE THESE CHANGES EFFECTIVE?

I. New Leave Rights Related to Military Service

The provisions of the NDAA providing for FMLA leave to care for ill or injured servicemembers became effective on January 28, 2008, when the bill was signed into law. The Department of Labor is working quickly to prepare more comprehensive guidance regarding rights and responsibilities under this new legislation. In the interim, the DOL's Wage and Hour Division is requiring employers to act in good faith in providing leave under the new legislation.

In contrast to the 26-week caregiver leave, the NDAA expressly determined that the 12-week exigency leave provisions do not become effective until after the Secretary of Labor issues final regulations defining "any qualifying exigency." In the interim, the DOL has encouraged employers to provide this type of leave to qualifying employees.

II. Proposed Revisions to General FMLA Regulations

The reissued Proposed Regulations will be effective upon issuance in their final form, which the DOL hopes will happen prior to January 1, 2009. In the meanwhile, however, the revised Proposed Regulations are the expression of how the Department of Labor interprets FMLA's requirements, and employers subject to FMLA would be wise to begin the process of determining how their FMLA practices and procedures align with or diverge from the new guidance.

HOW DO THESE CHANGES AFFECT ME AND WHAT DO I NEED TO DO?

I. General Impact

- As stated above, the 26-week caregiver entitlement is effective immediately. Employers should promptly consider how they will comply with the new requirements.
- Further, all employers covered under FMLA should immediately review their employee handbooks, employee policies and/or other written documentation in order to determine how and where these materials will need to be updated for either the new military leave entitlements or to reflect changes in the DOL's Proposed Regulations.

- Employers should promptly consider the impact of the new notice requirements on how they process and determine FMLA applications.
- The February 11 notice of proposed rulemaking identified many areas with regard to which the DOL has invited comment from the legal and business communities. Any comments that employers or professionals wish to submit regarding the proposed rule or administration of the new military leave requirements must be received by the DOL before April 11, 2008.
- Finally, the recent changes to FMLA will require an update to the mandated FMLA worksite poster / general notice. The Department of Labor is working at present on changes to the proposed poster and general notice to incorporate the new military family leave provisions and any other areas necessary. Employers should watch for an updated FMLA worksite poster and for any other general notice requirements from the DOL.

II. Employee Benefits-Specific Impact

Clearly the most significant impact of all new FMLA guidance with regard to employee benefits will be the 26-week caregiver leave entitlement and its effect on how employers administer their ongoing benefit plans – especially major medical health plans.

FMLA requires that employers continue to make health and certain other employee benefit plans available to participants who are out on FMLA-governed leave. In turn, where a plan requires some employee contribution, plan sponsors may continue to require the same contribution from employees on FMLA leave. While there are 3 different mechanisms regarding payment by employees of their share (including “up-front” payment before leave commences, “pay-as-you-go” payment through either continuing payroll reduction where possible or participant check where there is no payroll amount to reduce, and “catch-up” payment after the employee returns from leave), many plans and plan sponsors have in the past continued to provide coverage even where the individual does not make prior or contemporary payments. These plans instead require the participant to make up missed payments after returning from FMLA-covered leave. In essence, the plan has measured the risk of lost contributions due to participants not returning from leave against the administrative burden and general fairness issues involved in terminating coverage, and then reinstating same when the employee does return from leave. Since the maximum leave period was only 12 weeks, many considered the risk to be relatively low. Might a leave over twice as long – 6 full months – change that calculus?

Employers should also consider the impact of 26 weeks of FMLA-protected leave on COBRA administration for those plans covered under those continuation requirements. Generally, the COBRA election period will not begin until a participant fails to return to

work after exhausting their FMLA leave period or informs the employer that he or she will not be returning. Again, health plans and plan sponsors will need to ensure that proper controls are in place to meet their COBRA election notice requirements after the end of the new 26-week leave periods. HIPAA's requirement for Certificates of Creditable Coverage should be similarly affected.

The 26-week caregiver leave period may also produce impacts upon an employer's qualified retirement plans and upon certain non-qualified executive compensation plans. These issues should be examined, as should any unintended impact under Internal Revenue Code Section 409A's rules for deferred compensation.

Finally, all employers should review their participant communications, including Summary Plan Descriptions to see if they will need to be updated to reflect changes in FMLA administration or the new FMLA leave entitlements.

Further Information

General DOL discussion of both recent changes to FMLA can be found at:

<http://www.dol.gov/esa/whd/FMLANPRM.htm>

Fact Sheet on Proposed Regulations can be found at:

http://www.dol.gov/esa/regs/compliance/whd/whdfs_FMLA_NPRM.pdf

Published text of Proposed FMLA Regulations can be found at:

<http://www.dol.gov/esa/whd/fmla/FedRegNPRM.pdf>

The present text of the Family Medical Leave Act, as amended by Section 585 of the National Defense Authorization Act for FY 2008 can be found at:

<http://www.dol.gov/esa/whd/fmla/fmlaAmended.htm>

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