



November 12, 2009

## The New FMLA: Are You in Compliance?

Nearly a year ago, on November 17, 2008, the U.S. Department of Labor published its long-awaited final regulations interpreting the Family and Medical Leave Act. The new rules became effective on January 16, 2009. Serving as the first substantial changes to the regulations since the FMLA became law 15 years ago, the new regulations significantly impact the manner in which employers administer the FMLA. Although employers can now obtain more detailed and timely information from employees and their health care providers, employers must also promptly comply with new mandatory notice requirements. In addition to the new FMLA regulations, employers must also comply with recent amendments to the FMLA itself, which expand FMLA leave rights for employees whose family members are deployed on active duty in the military, or who need leave to care for injured military servicemembers and veterans.

This executive summary provides an overview of some of the key changes in the new regulations and amendments. Employers who have not already done so are strongly advised to update their policies, procedures, and forms to reflect these changes, and to ensure that human resources and management personnel responsible for administering FMLA leave have up-to-date information on these requirements.

While employers must learn and comply with the law and regulations in effect today, it is also important to note that further change is likely in the near future. There are a number of bills pending in Congress which, if enacted, could expand FMLA coverage, limit employers' ability to manage FMLA leave, and even require employers to provide paid FMLA leave. Given the present political balance, there is a strong likelihood that at least some of these bills will become law. Employers should closely monitor these developments, and should be prepared to act quickly if further changes to policies, procedures, and forms are needed.

### **FMLA Coverage**

#### **JOINT EMPLOYER COVERAGE (§ 825.106)**

The new rules clarify that outside companies (Professional Employer Organizations) that contract with employers to provide administrative functions such as payroll, benefits, regulatory paperwork, and updating employment policies, will not ordinarily be considered "joint employers" of the client's employees *unless* they: 1) have the right to hire, fire, assign, or direct and control the client's employees; or 2) benefit from the work the client's employees perform.

#### **ELIGIBLE EMPLOYEE (§ 825.110)**

To be eligible for leave under the FMLA, an employee must be employed by the employer for at least 12 months, and must work at least 1250 hours during the 12 months preceding the start of the requested leave. These 12 months, however, need not be consecutive. Under the current rules, *any* prior employment with the same employer counts towards the employee's 12-month eligibility period, regardless of the gap in employment. As a result, courts have been inconsistent in applying this regulation.



The new rules provide that periods of employment preceding a break in employment of seven years or more need not be counted in determining whether an employee has been employed for 12 months, with certain exceptions. Further, the new rules clarify that employees who take leave as a result of military obligations must be credited for the hours of service they would have performed but for their military service for purposes of meeting both the 12-month and the 1250-hour eligibility requirements.

#### **SERIOUS HEALTH CONDITION (§ 825.115)**

##### ***Continuing Treatment***

Under the FMLA, an employee may take leave due to the employee's own serious health condition, or the serious health condition of son, daughter, spouse, or parent.

The new rules largely retain the definition of "serious health condition." However, under the current rules, a condition that involves a period of incapacity of more than three days is a "serious health condition" if it also involves either: 1) two or more treatments by a healthcare provider; or 2) one treatment by a healthcare provider followed by a regime of continuing treatment under the supervision of a healthcare provider, such as a course of prescription medication.

Under the new rules, a condition would be a "serious health condition" under this part of the definition only if the first medical treatment occurs within seven days after the first day of incapacity. Further, under the "two or more treatments" prong of this definition, both treatments must occur within 30 days of the first day of incapacity, absent extenuating circumstances.

Notably, the health care provider—not the employee—must decide if a second visit within the 30-day period is required.

A condition may also be a "serious health condition" if it is a "chronic condition" that requires "periodic" visits to a healthcare provider. While the current rules do not define "periodic," the new rules specify that "periodic" means at least two visits to a health care provider per year.

#### **CARE FOR A FAMILY MEMBER (§ 825.124)**

The new rules provide that an employee need not be the only person able to care for a family member with a serious health condition or a covered servicemember. Although not expressly stated in the current rules, this provision is consistent with the DOL's interpretation of the current rules.

#### **Leave Entitlement, Pay and Benefits During Leave, and Job Restoration**

##### **CALCULATING AMOUNT OF LEAVE USED (§ 825.200)**

The new rules clarify and make several changes to the manner in which employers are required to calculate the amount of FMLA leave used by an employee. Generally, to calculate how much leave an employee has used during a given workweek, the new rules require the employer to divide the number of hours the employee was absent during that week by the number of hours the employee would have worked in the same week, but for the FMLA leave.



### **Variable workweek**

Where an employee's work schedule varies from week to week, the current rules require the employer to average the number of hours worked by the employee over the 12 weeks preceding the FMLA leave. The new rules require the employer to average the employee's hours over the 12 *months* preceding the leave.

### **Holidays**

Currently, it is unclear how employers should count FMLA leave taken during a workweek that includes a holiday. The new rules address this confusion by providing that, if an employee takes leave for an entire workweek that includes a holiday, the employee is charged for the full week of leave, including the holiday. However, if an employee takes leave in increments of less than a full week, the holiday is not counted against the employee's FMLA leave allotment, *unless* the employee would otherwise be scheduled to work on the holiday.

### **Overtime (§ 825.205)(c)**

There also has been some confusion under the current rules as to how employers are to account for overtime when calculating the amount of FMLA leave used by an employee. The new rules provide that when an employee misses overtime work due to FMLA leave, the overtime may be counted against the employee's FMLA leave allotment if the employee would be required to work the overtime hours but for his or her FMLA leave.

### **INTERMITTENT LEAVE FOR MEDICAL TREATMENT (§ 825.203)**

Under the new rules, an employee who takes intermittent leave because of planned medical treatment must make a "reasonable effort" (as

opposed to the former rule's requirement that the employee simply "attempt") to schedule the treatment so as not to unduly disrupt the employer's operations. Indeed, the DOL notes that the employee must try to arrange medical treatment in a manner which accommodates the employer's needs, but acknowledges that this general guidance is fraught with exceptions.

### **SUBSTITUTION OF PAID LEAVE (§ 825.207)**

Under the new rules, employers are required to allow employees to substitute paid leave such as vacation and personal days for FMLA leave only when the employee is otherwise eligible for paid leave under the employer's policies. For example, if an employer requires all paid vacation to be scheduled in advance, it need not permit an employee to substitute paid vacation for an unscheduled FMLA leave.

### **EFFECT OF FMLA LEAVE ON BONUSES, RAISES (§ 825.215(C)(2))**

Under the current rules, raises, bonuses, and incentive payments based upon the "non-occurrence" of events, such as absences or safety violations, may not be denied due to FMLA leave. As a result of this rule, employers have been required to grant certain benefits, such as a perfect attendance bonus, to employees who did not meet the requirements for the benefit due to their FMLA leave. Under the new rules, employers may condition bonuses or pay increases upon attainment of certain goals, and may deny these benefits to employees who fail to meet these goals due to FMLA-protected leave, so long as the employer does not treat employees who take similar forms of leave more favorably than those who take FMLA leave.



### **WAIVER/SETTLEMENTS (§ 825.220(D))**

Under the current rules, some federal courts have held that an employee cannot waive claims under the FMLA without approval by a court or the Department of Labor. As a result, there was some question as to the effectiveness of private settlement agreements or severance agreements waiving FMLA claims. The new rules clarify that an employee may waive claims based upon past violations of the FMLA without court or DOL approval, but may not prospectively waive their rights under the FMLA.

### **LIGHT DUTY ASSIGNMENTS (§ 825.220(D))**

Under the current rules, employers have been able to charge against FMLA leave an employee's time performing light duty assignments. Under the new regulation, this practice is no longer allowed. Now, the employee's right to job restoration is "tolled" during the light-duty assignment. If the light-duty assignment ends before the employee is able to resume his/her regular job, the employee may utilize FMLA leave. This change is significant, since it may have the effect of requiring job restoration in some instances *beyond* the 12 weeks allowed under the FMLA. For example, an employee might take FMLA leave for two weeks, work a light-duty assignment for ten weeks, then take ten more weeks of FMLA leave when the light-duty assignment ends. This scenario would require the employer to return the employee to his/her job after the employee exhausted FMLA leave, in this example, some 22 weeks later.

### **Employee and Employer Rights and Obligations under the FMLA**

#### **EMPLOYER NOTICE REQUIREMENTS (§ 825.300)**

The new rules consolidate the current rules' employer notice requirements into a single section, with several significant changes. The revised notice provisions are divided into four distinct requirements: 1) general notice; 2) eligibility notice; 3) rights and responsibilities notice; and 4) designation notice.

**General Notice:** As under the current rules, the new rules require employers to post a notice explaining employees' FMLA leave rights. The DOL has created a revised poster reflecting the changes in the new rules. The new poster "must be posted prominently where it can be readily seen by employees and applicants for employment." If a significant number of employees are not literate in English, the notice must be posted in a language in which the employees are literate. The new rules specifically allow for electronic posting, so long as all employees and applicants have access to the information.

In addition to the new poster, employers who have any eligible employees must provide the general notice to each employee by including it in an employee handbook or other written guidance to employees regarding benefits or leave rights, if any. If the employer has no handbook or written benefits or leave policies, the general notice must be distributed to each new employee upon hire. The new rules expressly permit electronic distribution – again, so long as the electronic notice otherwise is accessible to everyone.



### **Eligibility Notice**

Upon notice of an employee's need for leave that may qualify as FMLA leave, an employer must provide an "eligibility notice," informing the employee whether he or she is eligible for leave. (An employee is "eligible" if he or she has been employed for at least 12 months, worked at least 1250 hours in the 12 months preceding the start of leave, and is employed at a worksite where 50 or more employees are employed by the employer within 75 miles.) If the employee is not eligible, the notice must state at least one reason why the employee is not eligible. Absent extenuating circumstances, the employer must provide this notice within five business days after it receives notice of the employee's need for leave (as opposed to two business days under the current rules).

The new rule also clarifies that if an employee later needs to take additional leave for the same FMLA-qualifying reason, the employee remains eligible for leave for that reason, even if he or she would no longer be eligible to take leave for a different reason (i.e., because he or she drops below the 1250-hour requirement, or because the employer no longer has 50 employees working within 75 miles of the employee's worksite).

### **Rights and Responsibilities Notice**

The new rules require employers to provide a "rights and responsibilities notice" each time they provide an eligibility notice, as described above. (These forms may be found at Appendices C and D of the final regulations). The notice must advise the employee:

- That the leave may be counted against available FMLA leave, and of the applicable 12-month period used to calculate leave;
- Any certification requirements, and consequences of failing to provide certification;
- Employee's right to substitute paid leave, whether substitution is required, and employee's right to take unpaid leave if paid leave is unavailable;
- Any requirement to make premium payments for health coverage;
- Whether the employee is a "key employee," and the effect this has on the employee's restoration rights;
- The employee's right to maintain benefits during FMLA leave, and be restored to the same or an equivalent job upon returning from leave; and
- The employee's potential liability for health premiums paid by the employer if the employee fails to return to work after an unpaid FMLA leave.

The notice may also include information, such as whether the employer will require periodic reports of the employee's status and intent to work.

### **Designation Notice**

Within five business days of receiving sufficient information to determine whether leave qualifies as FMLA leave (e.g., after receiving a completed medical certification), the employer must notify the employee whether the leave will be *designated* as FMLA leave. Only one notice is required for each FMLA-qualifying reason per



applicable 12-month leave period, regardless of whether leave is taken in a single block or intermittently.

The notice must advise the employee if paid leave will be substituted for unpaid FMLA leave. The notice must also advise the employee if he or she will be required to submit a fitness for duty certification before returning from leave. If the amount of leave is known, the designation notice must inform the employee how much leave will be counted against his or her 12 weeks of FMLA leave. If this is not possible (e.g., because the expected duration of the leave is not known), the employer must advise the employee how much leave he or she has used upon request, no more often than once during each 30-day period in which leave is taken.

Under the new rules, an employer may provide both the eligibility and designation notice at the same time when the employer has the information necessary to designate the absence as FMLA leave.

#### **FAILING TO PROVIDE NOTICE TO EMPLOYEE (§ 825.301(E))**

Where an employer fails to notify an employee that the absence is designated as FMLA leave, the new rules adopt the Supreme Court's holding in *Ragsdale v. Wolverine World Wide, Inc.* 535 U.S. 81 (2002). Thus, where an employee can show "individualized harm" because the employer failed to provide notice of eligibility or failed to designate FMLA leave as required, the employee would be entitled to damages provided under the Act (e.g. lost wages, benefits, etc.)

#### **EMPLOYEE NOTICE REQUIREMENTS (§ 825.302)**

As under the current rules, if the need for leave is foreseeable, employees are required to provide notice of the need for leave at least 30 days in advance, or "as soon as practicable." Under the new rules, if an employee provides notice of foreseeable leave less than 30 days before the leave is to start, the employer may require the employee to explain why it was not practicable to provide leave sooner, and the employee is required to respond.

If leave is not foreseeable 30 days in advance, the employee must provide notice "as soon as practicable." The new rules clarify that "as soon as practicable" generally means either the same business day or the business day after the employee learns of the need for leave, but stress that employers must consider all relevant facts to determine whether it was practicable for an employee to provide earlier notice.

Notably, the new rules provide that employers may require employees to comply with the employer's usual and customary notice and procedural requirements for requesting leave, and may delay or deny FMLA leave for employees who fail to follow their policies, such as "call-in" procedures, absent "unusual circumstances," so long as the employer's policies do not require employees to provide notice sooner than required under the new regulations.

Also helpful to employers, where an employee seeks leave due to an FMLA-qualifying reason for which an employer previously provided FMLA leave, the employee now must specifically reference the qualifying reason for the need for leave.



**MEDICAL CERTIFICATION (§§ 825.305-825.307)**

If an employer requires that an employee submit medical certification in support of a request for FMLA leave, the new rules generally require that the request be made within five days after the employee gives notice of the need for leave. However, the rules also permit employers to request certification at a later date “if the employer has reason to question the appropriateness of the leave or its duration.” Employees must return the certification within 15 calendar days after the employer’s request, unless it is not practicable to do so or the employer grants a longer period.

The new rules specifically require employees to provide a certification that is both complete (i.e., all the blanks are filled in) and sufficient (i.e., the information provided is not vague, ambiguous, or non-responsive). If an employee provides an incomplete or insufficient certification, the employer must inform the employee in writing what additional information is necessary and allow the employee seven calendar days to cure the deficiency. Moreover, it must grant additional time if it is not practicable for the employee to correct the deficiency within seven days. If the employee fails to cure the deficiencies within the allotted time period, the employer may deny the request for FMLA leave.

Under the new rules, when an employee seeks FMLA leave for the employee’s own serious health condition, the employer may (but is not required to) include a statement of the essential functions of the employee’s job with its request for medical certification. If the employer does so, the certification may be deemed insufficient if the healthcare provider does not identify

which essential functions the employee is unable to perform.

The medical certification form also has changed. Among other things, the form now requires such information as: 1) the health care provider’s specialization; 2) medical facts regarding the employee’s medical condition and diagnosis; and 3) where applicable, certification that intermittent leave is medically necessary. (The new medical certification form may be found at Appendix B of the final regulations.)

**AUTHENTICATION AND CLARIFICATION OF MEDICAL CERTIFICATION (§ 825.307)**

If an employee submits a complete and sufficient medical certification signed by a healthcare provider, an employer may not request additional information from the healthcare provider. However, the new rule permits employers to contact the healthcare provider for purposes of authenticating and clarifying the certification, after giving the employee an opportunity to cure any deficiencies. While the current rules permit such contact only through a healthcare provider engaged by the employer, the new rules allow a human resources professional, leave administrator, or management official to make the contact, so long as the person is not the employee’s direct supervisor. “Authentication” is limited to confirming that the information in the certification was prepared or authorized by the healthcare provider who signed it. “Clarification” means contacting a healthcare provider to understand handwriting or to understand the meaning of a response. The new rules require employers to obtain a HIPAA-compliant release before obtaining personally identifiable health information from a healthcare



provider. However, an employer may deny FMLA leave to an employee who fails to provide such a release or otherwise clarify the certification.

#### **RECERTIFICATION (§ 825.308)**

Like the current rules, the new rules permit employers to request re-certification of a serious health condition no more often than every 30 days. If the original certification specifies a minimum duration for the condition of longer than 30 days, the employer must wait until the minimum duration expires before requesting recertification. However, if the minimum duration is longer than six months (e.g., for a lifetime condition), the employer may request recertification every six months, in connection with an absence. Employers may request recertification more frequently if: 1) the employee requests an extension of leave; 2) circumstances have changed; or 3) the employer receives information casting doubt on the validity of the earlier certification. The new rules codify a position previously expressed by the DOL in an opinion letter, and allow employers to provide a healthcare provider a record of an employee's absence pattern, and ask the healthcare provider if the serious health condition is consistent with this pattern.

#### **FITNESS FOR DUTY CERTIFICATION (§ 825.312)**

Under the current and new rules, employers may require employees to submit a fitness for duty certification before returning to work from FMLA leave. Under the new rules, employers now may also provide employees a list of essential job functions, and require that the fitness for duty certification address the employee's ability to perform those functions.

(Employees must be informed of these requirements in the designation notice.)

#### **Expansion of FMLA Leave to Families of Servicemembers**

On January 28, 2008, President Bush signed into law the National Defense Authorization Act ("NDAA"), which amended the FMLA to extend leave rights to family members of individuals engaged in military service. The NDAA amendments created two types of military family leave. First, they allow employees to take leave to care for certain family members who are seriously injured in the course of active military duty. Second, they permit employees to take FMLA-protected leave due to "qualifying exigencies" arising from a family member's military service. Effective October 28, 2009, Congress further amended the FMLA to expand these military family leave rights.

#### **LEAVE TO CARE FOR A COVERED SERVICEMEMBER WITH A SERIOUS INJURY OR ILLNESS**

The amended FMLA now guarantees covered employees up to 26 weeks of leave in a single 12-month period to care for a covered servicemember who suffered a serious injury or illness in the line of active military service and who is undergoing medical treatment, recuperation, or therapy; otherwise is in outpatient status; or is on the temporary disability retired list. A serious injury or illness is 1) a condition incurred in the line of active duty that may render the servicemember medically unfit to perform military duties or 2) a condition existing prior to active duty military service, which was aggravated by such service. This form of leave is available to employees



with family members in the Regular Armed Forces as well as the National Guard and Reserves. Eligible employees may also use this form of leave to care for a veteran undergoing medical treatment, recuperation, or therapy for a serious injury or illness incurred in the course of active duty, if the treatment, recuperation, or therapy occurs within 5 years after the veteran leaves military service.

To be eligible for leave, an employee must be the spouse, son, daughter, parent, or “next of kin” of the covered servicemember. If a covered servicemember designates a specific relative as their next of kin for FMLA purposes, only that person is regarded as the next of kin. If no such person is designated, the “next of kin” is the nearest blood relative other than a spouse, son, daughter, or parent, in the following order of priority: a blood relative granted legal custody over the covered servicemember, brothers and sisters, grandparents; aunts and uncles, and first cousins. If there are multiple family members with the same level of relationship to the covered servicemember, all are eligible for FMLA leave to care for the servicemember.

The 26 weeks of leave must be taken within 12 months after the first day of such leave, and is available on a “per-covered-servicemember, per-injury basis.” Thus, if an employee takes 26 weeks of leave in one year to care for an injured servicemember, he or she may not take an additional 26 weeks of leave the following year, unless the leave is to care for a different covered servicemember, or to care for the same servicemember due to a new serious injury or illness. Any unused leave at the end of a 12-month period is forfeited.

When an employee requests leave to care for an injured or ill servicemember, the employer may require the employee to obtain a certification completed by the servicemember’s health care provider, stating whether the servicemember was injured in active duty; the approximate date on which the injury or illness commenced or occurred and its probable duration; and a statement establishing the need for care. The employer may also require the employee to submit a certification that states the employee’s relationship to the servicemember, whether the servicemember is a current member of a military agency, a description of the care to be provided to the servicemember, and the estimated leave needed to provide the care. The employer may not require recertification.

The DOL has developed an optional form at Appendix H of the final regulations that employers can provide employees for certification. Note, however, that this form has not been updated to reflect the October 2009 amendments expanding military caregiver leave to family members of veterans.

#### **LEAVE DUE TO A QUALIFYING EXIGENCY**

To be eligible for “qualifying exigency” leave, a covered employee must be the spouse, parent, son, or daughter of a “covered military member.”

For purposes of “qualifying exigency” leave, “covered military member” refers to members of the regular Armed Forces, National Guard and Reserves who are on or have been notified of an impending covered active duty deployment to a foreign country.



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Congress left the term “qualifying exigency” undefined, delegating this responsibility to the DOL. The new rules permit “qualifying exigency” leave for the following eight reasons:

- Short notice deployment: up to seven days’ leave to attend to issues arising from the fact that a covered military member is notified of a call to active duty seven or fewer calendar days prior to the date of deployment;
- Military events and related activities: to attend events such as official ceremonies and programs, family support or assistance programs, and informational briefings;
- Childcare and school activities: to arrange for alternative childcare, to provide childcare on an urgent and immediate need basis, to enroll in or transfer to a new school or childcare facility; or to attend school meetings;
- Financial or legal arrangements: to make arrangements to address the military member’s absence, such as preparing wills and transferring bank account signature authority; and to act as the military member’s representative before a government agency with regard to military benefits;
- Counseling: to obtain counseling for issues arising from the military member’s active military duty from someone other than a healthcare provider, for the covered employee, the covered military member, or a child of the covered military member;

- Rest and recuperation: to spend time, up to five days during each period a military member is on leave, with a covered military member during leave from deployment;
- Post-deployment activities: to attend events such as arrival ceremonies and reintegration briefings that occur no more than 90 days following the termination of active duty status, and to address issues that arise from the death of a covered military member, such as making funeral arrangements;
- Additional activities: to address events related to a covered military member’s military duty, as mutually agreed by the employee and employer.

The first time an employee requests leave due to a “qualifying exigency,” an employer may require the employee to provide a copy of the active duty orders or other documentation demonstrating the military member’s call to active duty. In addition, an employer may require the employee to submit a certification stating the dates of leave, if known. This information need only be provided to the employer once—employers may not require recertification.

The DOL has approved a recommended form at Appendix G of the final regulations. Note, however, that this form has not yet been updated to reflect the October 2009 amendments expanding qualifying exigency leave to families of those in the regular Armed Forces.



## How Should Employers Prepare for these Changes?

To be fully prepared for these changes to the FMLA, at a minimum, an employer must:

- Update personnel policies and procedures to reflect the new requirements. Take this opportunity also to review your call-in procedures and similar notice requirements.
- Update employer response forms, medical certification forms, and new forms to be utilized under the new servicemember provisions. Please contact us if you need assistance drafting updated forms that secure the information you need based on your operations.
- Train! Train! Train! From the front-line supervisor to the top executive, managers must understand their responsibilities to effectively manage an employee with a medical condition. Properly training your managers in this area of the law must become a regular part of employers' operations, as it will significantly reduce the risk of legal liability.
- Stay up to date on current FMLA developments. More changes to the FMLA are likely in the near future, so it is vital that employers continue to adapt their policies and procedures to comply with the law as it evolves.

## Contacts

Jeffrey S. Nowak  
312.786.6164  
jsn@franczek.com

William R. Pokorny  
312.786.6141  
wrp@franczek.com

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