

BenAlert

BENEFIT TRENDS AND LEGISLATIVE UPDATES

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Howitt Benefit Services is pleased to provide you with periodic updates on benefit trends and legislative updates. As part of our valuable services, we want to ensure that you are in compliance and well-informed of the ongoing changes in our industry.

In this BenAlert:

- New Family and Medical Leave (FMLA) Regulations

New Family and Medical Leave Regulations

As you may recall, Congress enacted the Family and Medical Leave Act in 1993. The Department of Labor (DOL) issued its only set of FMLA regulations in 1995. Since that time, federal courts have interpreted the FMLA (sometimes inconsistently) and the U.S. Supreme Court actually invalidated portions of the current regulations. So now, the DOL has issued new Final Regulations (New Regulations) which are more comprehensive than the 1995 regulations. Many of the enhancements respond to court decisions; others are a result of comments made during what became a two year comment period (2006-2008). Since the New Regulations are very detailed and require serious study, we have limited this BenAlert to a discussion of the key changes.

Effective Date

The New Regulations take effect as of January 16, 2009.

Background

Here are the basic FMLA rules as originally enacted in 1993:

Covered Employer. Employers who employ 50 or more employees for each working day during each of 20 or more calendar work weeks in the current or preceding year.

Eligible Employee. An employee who has been employed by the employer for at least 12 months; has worked at least 1,250 hours during the 12 month period immediately preceding the start of the leave; and, works at a worksite where 50 or more employees are employed by the employer within a 75 mile radius.

Entitlement Prior to the Amendment. Under the original FMLA law, an eligible employee is entitled to 12 weeks of unpaid leave for any of the following: (1) the employee's own serious health condition that makes the employee unable to perform the functions of the employee's position; (b) the birth of the employee's child, to care for the employee's own newborn child, or for placement of a child with the employee for foster care or adoption; or (c) to care for the employee's spouse, child, or parent with a serious health condition.

California Family Rights Act. Current California law (CFRA) provides the identical benefits to employees who meet the FMLA eligibility requirements applicable to most employers not subject to FMLA. The CFRA applies to employers who do business in California with 50 or more employees (full time and part time) working anywhere within the United States or its possessions, including non-profit religious organizations. It also applies to the State of California and any of its political subdivisions, cities, and counties regardless of the number of employees. For details on the CFRA, please refer to <http://www.dfeh.ca.gov/about/cfraDescription.aspx>

At present, the California Legislature has taken no action to amend the CFRA to incorporate the federal Amendment. However, effective January 1, 2008, California now provides new military leave up to 10 days at the time an active duty member of the Armed Forces is on military leave ([AB 392](#)). This new California legislation applies to employers with 25 or more employees. For details of this legislation, please refer to our Legislative Update 2008-3, first published on January 27, 2008. (From Legislative Update 2008-5, *FMLA Benefit Expansion: Action Required*)

Discussion

Note: All references to the New Regulations in this discussion are to 29 CFR as amended by the New Regulations.

Military Amendment. The National Defense Authorization Act of 2008 (NDAA) was signed into law on January 28, 2008, creating two new leave entitlements:

Call to Active Duty; 12 Week Leave: Available to an eligible employee who is the spouse, son, or daughter, parent, or next of kin of a Covered Service Member who is on active duty (or has been notified of an impending call to active duty) in support of a Contingency Operation as a result of a Qualifying Exigency (e.g. child care).

Caregiver Leave; 26 Week Leave: Available to an eligible employee who is the spouse, son or daughter, parent, or next of kin of a Covered Service Member who is undergoing medical treatment, recuperation

or therapy, are in an outpatient status, or on temporary disability due to an injury or illness incurred in the line of duty. This leave also may be taken on an intermittent basis or pursuant to a reduced leave schedule.

Implementation of the Military Amendment. New Regulations provide guidance on two important provisions in the Military Amendment.

Qualifying Exigencies Defined: The Military Amendment allows leave due to a qualifying exigency to allow family members to manage the affairs of family members who are called to active duty in the National Guard or Military Reserves. However, the Amendment did not define “qualifying exigency.” The New Regulations, on the other hand, provide the meaning of “exigency” at 29 CFR 826.126:

Short-notice deployment (seven days notice);

Attending military events related to the call to active duty;

Arranging for childcare;

Attending school activities;

Making financial or legal arrangements;

Attending counseling;

Spending time with a covered military member on short-term temporary rest (up to 5 days) or leave;

Attending post-deployment activities (e.g. arrival ceremonies, reintegration briefings, etc. so long as within 90 days of active status; and,

Additional activities (as long as the employee and employer agree to timing and duration of leave).

The employee may take leave on an intermittent basis. The employer may require certification of the need for the leave. The DOL provides a prototype sample certification document (825.309).

Caregiver Leave. Under the Military Amendment, an employee may take leave up to 26 work weeks in a single 12 month period to care for a service member with a serious injury or illness (825.127).

Serious illness or injury: A “serious illness or injury” means an injury or illness incurred by a covered service member in the line of duty on active duty that may render the service member medically unfit to perform the duties of his or her office, grade, rank or rating. It is not the same as a “serious health condition” for other FMLA purposes.

Please refer to the “serious health condition” discussion at Section 5b. of this Memorandum.

Son or Daughter: For purposes of leaves pursuant to the Military Amendment, the definition of son or daughter is expanded to include adopted or foster child as well as stepchild, legal ward, or child for whom the service member stood in *loco parentis*, regardless of age. This definition will apply only for purposes of the Military Amendment.

Parent of a Covered Service Member: The definition of parent means a biological, adoptive, step or foster parent, or any other individual who stood in *loco parentis* to the employee when the employee was the parent of the service member.

Next of Kin: The New Regulations define a service member's next of kin as his or her nearest blood relative, other than the covered service member's spouse, parent, son, or daughter, in the following order of priority: blood relatives who have been granted legal custody of the service member by court decree or stator provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered service member has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under the FMLA, in which case the designated individual shall be deemed to be the covered service member's next of kin.

The New Regulations permits an employer to confirm an employee's status as a covered service member's next of kin through the procedures for confirming familial relationships.

Duration Issues: The New Regulations clarify that the employee cannot then take an additional twelve weeks of FMLA leave under the original FMLA entitlement rules. This military leave when added to leave under the original entitlements cannot exceed 26 weeks.

Relationship to General FMLA Regulations. Except where discussed above (definitions of son and daughter, parents, and next of kin) the general FMLA regulations will apply, where feasible, as if it were for other types of leave, including FMLA designation and certifications.

The Ragsdale Case: 12 Weeks Means 12 Weeks. The U.S. Supreme Court ruled (in *Ragsdale v. Wolverine Worldwide, Inc.*) that a failure by the employer to comply with its duty to designate leave as FMLA leave and provide notice to the employee that the leave will be treated as FMLA leave on timely basis, will not alter the leave duration absent a showing of individualized harm to the employee. The Court, thereby struck the automatic penalty provision for such failure. This penalty provision would allow the FMLA leave to be counted from the date of the non-timely notice rather than on the first day of the original leave. Numerous other lower courts invalidated penalty provisions in the original regulations. The New Regulations reflect the court decisions by removing most of the penalty provisions on the basis that their application distorts the intent of the original law.

Other Significant Changes to FMLA. The following discussion highlights the major changes found in the New Regulations.

Determining an Employee's Eligibility: The basic rule (12 months of employment and at least 1250 hours worked in the last 12 months) has been clarified to allow for breaks in service, military leave, and the like. With regard to twelve months of service (825.110(b)), employers must now include all service within the last seven years. This seven year rule will not apply if the gap in service is a result of military duty or is made inapplicable under a collective bargaining agreement's provision to guarantee re-hire. The service need not be continuous service. FMLA rules only require the employer to keep records for three years. As a result, an employee may need to produce his/her own records to support the time employed prior to the last three years.

As for counting hours of service (825.100(c)), for military personnel, the employer must give credit for periods of active military duty in the National Guard or as a reservist called to active duty. The preamble implies that employers may use the employee's pre-service work schedule in performing the calculation.

Section 825.110(d) allows an employee's non-FMLA leave just prior to FMLA leave to count towards the years of service component.

Serious Health Conditions: The Common Cold? The original regulations contain six different definitions of "serious health conditions." The New Regulations elaborate on at least two of these definitions. The DOL has not specifically ruled out minor ailments out of fear that it also will rule out FMLA protected ailments by inadvertence. So, the common cold must meet the modifications contained in the New Regulations (825.113 and 825.115): The employee must have visited a health care provider on at least two occasions in the 30 day period from the onset of the illness. The first visit must occur within seven days at the onset. The second visit must be at the provider's request. The serious health condition still must result in three or more days of incapacity. Inpatient care speaks for itself.

In the case of chronic serious health conditions, the original regulations required periodic visits for treatment. The New Regulations describe "periodic" to mean "at least two or more visits per year for the same condition."

Coverage to Care for a Family Member: The New Regulations address care for an adult child. The final rule requires that the determination of the adult child's disabling condition should be made at the commencement of the employee's leave, not after the leave commences. To document the disability, the New Regulations only require "a simple statement" from the employee documenting the qualified family relationship. Finally, the employee requesting the leave does not have to be the only person available to provide the necessary care (825.122 and 825.124).

Intermittent Leave: To account for periods of intermittent leave, the final rule states that an employer must use an increment "no greater than" the shortest period of time used for other forms of leave (bereavement, voting, sick leave, personal leaves), but increments no greater than one hour. Additionally, the employer cannot treat as leave any time during which the employee is working. For example, the employee returns to work at 1:00 P.M. from lunch, works 30 minutes, and then gets sick and goes home. The employer cannot

dock the employee for FMLA purposes, for the half hour worked from 1:00 P.M. to 1:30 P.M. (825.20 and 825.205).

To calculate intermittent leave for individuals who have varying work schedules, final rules require the employer to look at a 12 month average. The old rule only required the employer to use the 12 week period immediately prior to the intermittent leave (825.205(b)).

In situations where an employee is eligible for overtime but refuses to work overtime, the final rule will allow employers to treat the overtime hours as intermittent leave only if the employee cannot work the hours due to an FMLA qualifying condition (825.205(c)).

Paid Leave Offsets: Under the New Regulations, if an employer's policy requires vacation leave to be taken in full day increments, an employee substituting vacation for FMLA leave will have no right to take less than a full day of vacation leave at time. Employers must notify employees of restrictions related to paid leave (e.g. 2-day advance notice) and that the employee will remain eligible for unpaid leave in the interim (825.207).

Paid Leave and Disability Benefits: The New Regulations keep the old rule prohibiting the substitution provisions when there is a disability benefit payable during FMLA leave. The New Regulations will allow the employer and employee to agree to have paid leave run concurrently with FMLA to supplement the disability benefit as long as it does not violate state law. In California, the pregnancy disability and FMLA benefits run consecutively (825.207(d)).

Miscellaneous Rules.

Worksite (825.111): For individuals who work for joint employers, the employee's worksite (for measuring 50 employees within a 75 mile radius) is the place where the employee is stationed for at least one year. For telecommuters, their worksite is the office to which they report.

Treatment of Holidays (825.200(h): If a holiday occurs during the work week, and if the employee is taking the whole week as FMLA leave, the holiday counts against the 12 week entitlement. If the employee is taking leave in increments less than one week, the holiday will only count against the twelve week entitlement if the employee would have been required to work on the holiday.

Light Duty (825.220(d): The New Regulations make it clear that an employee working in a voluntary light duty position does not reduce his FMLA entitlement. Restoration to an equivalent or same position is not guaranteed if the employee returns to work in a light duty capacity following completion of his 12 week entitlement.

Notification Requirements

The New Regulations have revised the type and number of notices that employers must provide to employees and contain prototype samples for employers to use. It is also important to note that under most circumstances employers may distribute these notices electronically. The DOL has yet to produce final versions of these notices.

General Notice (825.300(a)). Employers must post this notice and also distribute it to employees. Employers may include the Notice in an employee handbook or distribute it to employees upon their hire. If the employer does not have a handbook, then he/she should distribute the Notice to each employee at the time of hire, either by hard copy or electronically. The New Regulations require the distribution as a matter of course. Employers cannot wait to distribute the Notice at the time of a leave request.

Electronic Posting: This is available to employers where all employees have access to company computers that post the Notice in a conspicuous manner. It must be accessible to all job applicants as well as to employees.

Non-English Speaking: If the workforce contains a significant number of people whose native language is other than English, employers must issue the Notice in the language in which these employees are literate.

Eligibility (825.300(b)) and Rights and Responsibility Notices (825.300(c)). Employers must provide a notice of an employee's eligibility along with a notice of their rights and responsibilities within 5 business days of receiving an employee's request for FMLA leave.

The employer must also notify the employee that he/she has met the FMLA eligibility criteria to commence an FMLA leave or, conversely, notify the employee that he/she does not qualify for an FMLA leave and the reasons for the declination. Both notices must be provided at the same time.

Qualifying Leave (825.300(d)). Once the employee commences leave and if that leave qualifies as an FMLA leave, the employer has five days from the leave's commencement to confirm that it will be treated as an FMLA qualifying leave. The DOL provides a prototype of this "Designation Notice" in its New Regulations.

Contents of the Designation Notice: The Designation Notice must include the dates which will be designated as FMLA leave. The Notice must also specify any periods for which FMLA rules will not apply whether to a lack of information from the employee or if it is clear that the leave time in question does not qualify as FMLA leave. The Notice must also state whether a "Fitness for Duty" certification is required.

Intermittent Leave: Upon the employee's request, an employer must specify the number of hours counted against FMLA during the period and provide Notices at intervals on the amount of leave taken in that period. The employee may request this Designation Notice no more frequently than every 30 days during the period of the leave.

Employee Notice of Intent to Take FMLA Leave (825.301 – 825.302(d)). At the time the employee intends to commence a valid FMLA leave, the employee must notify the employer with enough information to allow the employer to consider FMLA eligibility when the leave is foreseeable. This may not be possible when the leave is non-foreseeable such as an automobile accident, or similar event that seriously disables the employee at the time of its occurrence. In the event the leave is foreseeable, the employee must notify the employer at least 30 days prior to commencement. When it is not foreseeable, the New Regulations require the employee to follow a call-in procedure. Failure to do so may result in a delay or denial of FMLA leave.

If the employee has taken FMLA leave in the past for the same qualifying reason, the employee must still notify the employer and provide a specific reason for this leave.

Medical Certifications (825.306). The DOL provides two types of medical certifications under the final rule. One is for the employee's own serious health condition. The other is for use when the leave is to care for a family member with a serious health condition. The final rule will allow doctors to specify a diagnosis (not so under the 1995 regulations).

Incomplete Certification: In the event that the doctor-provided information is incomplete or in any other way deficient, the employer must notify the employee in writing and request the missing information. Employees will have seven days to do so (825.305(c)).

HIPAA Issues: The contact must comply with HIPAA privacy rules, including a release from the employee to contact his/her doctor or other provider for a specific purpose or event. Employers cannot require the employee to provide the release (825.307).

Recertification: The New Regulations allow an employer to request recertification of an ongoing condition every six months, where the condition will last not less than 30 days. In the case of long term illness where the employee returns to work, the employer may contact the provider to inquire whether current absences from work are consistent with the employee's medical condition (825.308).

Fitness for Duty Reports: Employers may require fitness for duty reports upon the employee's return to work following FMLA leave. The New Regulations specify that these reports must certify that the employee can perform the essential functions of his/her job. As we stated above, for an employer to require a fitness for duty report, the employer must have notified the FMLA continuee that such a report may or will be required at the time the employee intends to return to work.

Action Plan for Covered Employers

Covered employers must review their current FMLA procedures for compliance. Employers must modify all FMLA notices as well as all other relevant notices to conform to the prototype notices in the New Regulations. Although final sample notices are not yet available it is important to modify forms by January 16, 2009. Attached are prototype forms you can post until Final Regulations are released.

Review all other formal paid leave policies for consistency and interface with FMLA. If there are no formal written leave policies and leaves are granted, then the employer needs to commit those informal policies to writing and administer leaves in a manner consistent with the new written policies.

As time goes by and as the courts rule on these New Regulations, employers may need to modify what actions they take now. Most employment specialists will be able to advise them of changes here. We expect these regulations to stand as presented for a lengthy period of time. It is important that employer seek counsel if they have any doubt as to the practical meaning of each of its provisions.

The regulations as well as the prototype forms are posted on the following website for your reference: <http://www.abferisa.com>.

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