

## DEPARTMENT OF LABOR FINALIZES NEW FMLA REGULATIONS

On November 17, 2008, the U.S. Department of Labor (DOL) issued the first new regulations governing the Family and Medical Leave Act (FMLA) since the law's 1993 enactment. The final regulations, which take effect January 16, are intended to be more "user-friendly" for both employers and employees.

In part, the new regulations address employer notice requirements, medical certification standards, and permissible methods of accounting for leave time. They also implement two new bases for FMLA leave, both of which were signed into law last January: military exigency leave and service member family leave (for more information, see <http://www.nexsenpruet.com/assets/attachments/376.pdf>). Below are some highlights of the new regulations.

### NEW EMPLOYER NOTICE REQUIREMENTS

Under the new regulations, covered employers may be required to provide four different types of notices to employees: general; eligibility; rights and responsibilities; and designation. In tandem with the new FMLA regulations, the DOL has developed forms that will assist employers in implementing these notices. The forms, which are discussed in part below, adopt a "check-the-box" approach.

First, the "general notice" (Form WH-1420) is a detailed form that combines previous FMLA poster and policy requirements. It must be posted conspicuously. Any handbook or personnel manual should include an FMLA policy that covers the required notice provisions.

Second, the "eligibility notice" (Part A of Form WH-381) informs an employee as to whether he or she is eligible for FMLA leave. It must ordinarily be provided to an employee within five business days after the employee's first request for leave during a given leave year. The form also provides a space for employers to advise an ineligible employee as to why he or she did not qualify for FMLA leave.

Third, if an employee is eligible to take FMLA leave, the employer must simultaneously provide him or her with a "rights and responsibilities notice" (Part B of Form WH-381). As its name suggests, this form provides an employee with additional information concerning obligations for leave to qualify under the FMLA. For example, the form indicates whether a certification is required, as well as whether there is any company policy requiring or permitting the use of paid time off (PTO) while on FMLA leave.

Finally, employers may use a "designation notice" (Form WH-382) to advise an employee as to whether his or her request for FMLA leave has been granted. Generally, it should be provided to an employee within five business days after the employer acquires sufficient information to determine whether the leave qualifies. At this stage, the employer must also notify the employee if a fitness for duty certification will be required prior to returning to work.

The new notice system set forth above eliminates the need for employers to provisionally designate FMLA leave. Moreover, an employer and employee may now agree to retroactively designate leave as FMLA-qualifying.

## MEDICAL CERTIFICATIONS

The DOL has also developed two new medical certification forms: one for an employee's own serious health condition (Form WH-380-E), and one for the serious health condition of a qualifying family member (Form WH-380-F). Both are designed to elicit information needed by the employer to determine the necessary type and duration of FMLA leave.

The period of time within which an employer may request a medical certification has been extended from two days to five days. When the need for leave is foreseeable, the employer must request the certification within five business days after the leave is requested. However, if the need for leave is unforeseeable, the employer has until five days after the leave commences.

An employer must give an employee at least 15 days to provide the necessary certification. If a proffered certification is deficient, the employer must provide the employee at least seven additional days to attempt to cure the problem. Under certain circumstances, more time may be required.

In certain circumstances, an employer is now permitted to directly contact an employee's health care provider regarding a proffered certification. A human resources professional, leave administrator, or management official (other than the employee's immediate supervisor) may now contact an employee's health care provider to "authenticate" or "clarify" a medical certification. However, as a cautionary note, employers cannot ask for information beyond what is contained on the certification form.

Under the new regulations, employees cannot be compelled to provide a HIPAA consent. However, if an employee refuses to provide the necessary consent, his or her leave request may be denied.

## ACCOUNTING FOR FMLA LEAVE TIME

*How do I track FMLA leave and coordinate it with PTO?*

Prior to the new regulations, employers were required to track leave in increments equal to the shortest period of time used in their payroll system. Beginning on January 16, employers may track FMLA leave in increments of up to one hour. However, an employee may not be charged for time spent actually working. Employers are still permitted to use larger increments to track the use of PTO.

If employees are permitted (but not required) to use PTO during FMLA leave, then they may be required to adhere to their employer's standard PTO policies, even if those are more stringent than the FMLA. However, if an employer requires its employees to substitute PTO while taking FMLA leave, then it must waive any of its requirements that exceed the FMLA.

Additionally, an employer may now permit an employee to use his or her PTO during FMLA leave, even if the leave is otherwise paid through another type of benefit (such as workers' compensation or short-term disability).

*What about bonuses for attendance or safety?*

Under the previous regulations, absences caused by an FMLA-qualifying reason could not be taken into account when awarding perfect attendance or safety bonuses. However, employers will now be permitted to disallow an employee from such a bonus or award where the ineligibility is caused by an FMLA absence. Employers should be cautious to treat all absences equally.

*How do I count holidays?*

If a paid holiday falls within a full week of an employee's FMLA leave, employers are now expressly permitted to count the holiday as an FMLA absence. If a holiday falls within a partial week of FMLA leave, then the holiday may not be counted as an FMLA absence unless the employee was otherwise required to work on that day.

## MILITARY EXIGENCY LEAVE

Military exigency leave is intended to allow an employee who has a spouse, child, or parent in the National Guard or Reserves (or who in certain cases is a retired member of the regular Armed Forces) to take FMLA leave to deal with a "qualifying exigency" arising out of the family member's active duty or call to active duty in support of a contingency operation. The new regulations specify that a "qualifying exigency" includes the following circumstances: short-notice deployment; military events and related activities; childcare and school activities; financial and legal arrangements; counseling; rest and recuperation; post-deployment activities; and other exigencies upon which the employer and employee agree.

## WHAT SHOULD EMPLOYERS DO NOW?

Employers should begin taking immediate steps to comply with the new regulations by the January 16 implementation date. Training of HR professionals and leave coordination staff will be a key aspect of compliance. In addition, employers should review the DOL prototype forms and consider whether they will adopt these forms or revise their own in order to comply with the new notice requirements.

*This Employment Law Update is published as a service to our clients and friends. It is intended to be informational and does not constitute legal advice regarding any specific situation.*

### **N|P** Employment and Labor Law Group

#### **CHARLESTON**

843.577.9440

Cherie Blackburn  
Molly Hughes Cherry  
Josh Ellis

#### **CHARLOTTE**

704.339.0304

Sean Phelan  
Grainger Pierce

#### **COLUMBIA**

803.771.8900

Mike Brittingham  
Jennie Cluverius  
Kristian Cross  
David Dubberly  
Vickie Eslinger  
William Floyd  
Joan Hartley  
Angus Macaulay  
Susi McWilliams  
Nikole Mergo  
Sue Odom  
Sam Painter

#### **GREENSBORO**

336.373.1600

Trudy Ennis  
Peter Pappas  
Bill Wilcox

#### **GREENVILLE**

864.370.2211

Grant Burns  
Jamie Hedgepath  
Leon Harmon  
Rusty Infinger  
Michael Pitts  
Tom Stephenson

#### **HILTON HEAD**

843.689.6277

Melissa Azallion

#### **MYRTLE BEACH**

843.213.5405

Molly Hughes Cherry

### **NEXSEN | PRUET**

