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Family Medical Leave Act (FMLA) Notice – Final Rule to Implement Amendments to the FMLA Becomes Effective on January 16, 2009

On November 17, 2008, the Department of Labor's (DOL) Wage and Hour Division published its final rule¹ to implement the first amendments to the fifteen year-old FMLA. These new regulations become effective on January 16, 2009, and their purpose is to help employers and employees better understand their rights and responsibilities under the Act.

To ensure that employees better understand their rights and to minimize workplace disruptions due to unscheduled FMLA absences, the new provisions increase employers' notice obligations. Additionally, FMLA coverage for servicemembers and their family members has been expanded. Further, the final rule also incorporates and complies with recent decisions interpreting provisions of the FMLA by the U.S. Supreme Court and other courts.

The following is a summary of the new regulations:

- **Additional Benefits for Military Families –**
 - Military Caregiver Leave/Covered Servicemember Leave
 - Eligible employees who are family members of covered servicemembers may take up to 26 work weeks of leave in a single 12-month period to care for a servicemember with a serious illness or injury incurred in the line of duty while on active duty.
 - National Guard and Reserves – Qualifying Exigency Leave
 - Eligible employees with a covered military member serving in the National Guard or Reserves may use up to 12 work weeks of

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FMLA leave for any “qualifying exigency” related to a covered military member on active duty or called to active duty status in support of a contingency operation. Categories of “qualifying exigencies” include: (1) Short-notice deployment; (2) Military events and related activities; (3) Childcare and school activities; (4) Financial and legal arrangements; (5) Counseling; (6) Rest and recuperation; (7) Post-deployment activities; and (8) Additional activities agreed to by employer and employee.

- **Waiver of FMLA Rights** – The new regulations codify the DOL’s position that employees may voluntarily settle or release FMLA claims without court or DOL approval. However, prospective waivers of FMLA rights are still not allowed. For example, an employment agreement that required an employee to waive his or her right to take FMLA leave in the future or to only take 6 weeks of FMLA leave a year instead of 12 would be unenforceable.
- **No Deductions For Light Duty Work** – Under the new regulations, light duty work does not count against an employee’s 12-week FMLA leave entitlement.
- **Employer Notice Requirements** – The employer notice requirements are consolidated in the new regulations and must provide employees with certain information including: (1) a general notice about the FMLA; (2) an eligibility notice; (3) a rights and responsibilities notice; and (4) a designation notice. The deadline to provide the various notices to new employees has also been extended from two to five business days.
- **Employee Notice of Absence** – Absent unusual circumstances, employees taking FMLA leave must follow their employer’s usual and customary procedures for reporting time off.
- **Removes “Categorical Penalties” for Employers** – The new regulations remove categorical penalty provisions for employers but clarify that where an employee suffers individualized harm because an

employer fails to follow notification rules, the employer may be liable.

- **Denying Perfect Attendance Awards** – Employers may deny an employee a perfect attendance award for taking FMLA leave if it treats employees taking non-FMLA leave in an identical manner.
- **Clarifying Serious Health Conditions** – While the six individual definitions for serious health conditions remain, the new regulations specify how an employee qualifies in certain situations. For example, one way to qualify for a serious health condition is to make two visits to a health care provider within 30 days of the beginning of incapacity (the first visit must be within seven days of the first day of incapacity). The requirement will also be satisfied if the employee has more than three consecutive full calendar days of incapacity plus a regimen of continuing treatment (but the first visit still must take place within seven days of the first day of incapacity). Finally, with respect to chronic serious health conditions, “periodic visits” is defined as at least two visits to a health care provider per year.
- **Substitution of Paid Leave for Unpaid FMLA Leave** – Under the FMLA, employees may take paid leave or employers may require employees to take paid leave concurrently with their unpaid FMLA leave. An employee that elects to take paid leave during a portion of or for all of his or her FMLA leave must follow the employer’s general policy applicable to all employees for use of that type of paid leave because the new regulations treat all forms of paid leave the same. Paid leave taken concurrently with FMLA leave could include vacation time, paid personal leave, and paid sick and medical leave.
- However, the employer may waive any procedural requirements for the taking of paid leave and employees are always entitled to their unpaid FMLA leave even if they do not meet the employer’s requirements for taking paid leave.
- **The Medical Certification Process** –
 - To address medical privacy issues, the new regulations specify that the employer’s designated representative to communicate with

the health care provider must be a health care provider, human resource professional, leave administrator, or a management official, but cannot be the employee's direct supervisor.

- Further, employers are prohibited from asking health care providers for information other than what is required by the certification form.
- Additional changes include an updated Form WH-380 for the exchange of medical information, which creates separate forms for the employee and covered family members and allows (but does not mandate) health care providers to provide a diagnosis of the patient's health condition as part of the certification.
- In the event that an employer determines that a medical certification is not complete or is insufficient, the employer must provide written notification to the employee of what information is lacking and give the employee seven calendar days to cure the issue.
- The new regulations also make clear that employers may request a new medical certification each leave year for medical conditions that last longer than one year. Moreover, the final rule permits employers to request recertification of a continuing condition every six months in conjunction with an absence.

- **Fitness-For-Duty Certifications to Return to Work** – The final rule revises the fitness-for-duty certification process in two ways. To begin with, an employer may require the certification to address the employee's ability to perform the essential functions of the employee's job. Next, in the event that reasonable job safety concerns exist, an employer can require a fitness-for-duty certification before an employee may return to work when the employee takes intermittent leave.

Please check the DOL's Wage and Hour division section on its website² for additional information or contact one of Strasburger's labor and employment attorneys³ with any questions regarding compliance with the FMLA.

¹ <http://www.dol.gov/federalregister/PdfDisplay.aspx?DocId=21763>

² <http://www.dol.gov/esa/whd/fmla/index.htm>

³ http://www.strasburger.com/directory/dir_practicearea.asp?paid=20

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