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**NEW FMLA REGULATIONS  
REQUIRE MAJOR CHANGES  
TO EXISTING POLICIES**

After years in the making, on November 17, 2008, the Department of Labor (DOL) issued its final revised regulations for the Family and Medical Leave Act (FMLA). The DOL had gone through a lengthy rule-making exercise to “reduce uncertainty and provide greater predictability in the workplace for everyone.” The new rules will take effect 60 days after publication, on January 16, 2009. Because the regulations require a statement of FMLA policy to be included in all employee handbooks, it will be essential that companies revise their employee handbooks to reflect the changes in the law.

By far the most significant changes to the FMLA regulations pertain to the implementation of the Defense Authorization Bill, enacted in January 2008, which expanded the coverage of the FMLA to individuals providing assistance to members of the military and especially to wounded veterans. Under the new military coverage, eligible employees are entitled to take up to 12 weeks of unpaid leave for “qualifying exigencies” to help manage the affairs of a soldier or the soldier’s family before, during and after deployment. Qualifying exigencies include short-notice deployment, military events, child care and school activities, financial and legal arrangements, counseling, rest and recuperation, post-deployment activities and any additional activities negotiated between employers and employees.

Also, eligible employees would be entitled to up to 26 weeks of leave to care for a family member who was wounded while serving in the military. This 26-week leave entitlement is expanded beyond the customary parent, child or spouse to include “next-of-kin.”

The new regulations fail to provide employers with hoped-for relief from abuses to intermittent leave. They do, however, consolidate and provide additional guidance regarding the notices that employers are required to give to employees taking FMLA leave, including a general notice regarding FMLA rights, an eligibility notice, a notice of rights and responsibilities and a designation notice. The time period allowed for providing various notices to employees has been extended from two days to five. Employers will need to update their paperwork for each of these notices in the next 60 days.

One major improvement for employers, which they will want to include in their new policies, is the clarification that employees who experience unforeseen need for FMLA leave may be required to follow the company’s standard absence notification procedures, such as calling in before the employee’s start time, unless unusual circumstances prevent doing so. Under the previous regulations, it appeared that an employee had two days after the onset of an illness or injury to provide notice. The new regulations also remove certain provisions that provided categorical penalties to employers for failure to give the required notices, substituting a standard that provides liability only when the failure to follow the notification rules causes individualized harm to an employee.



Another aid to employers trying to understand the nature of an employee's or family member's "serious health condition" is the relaxing of the rules regarding contacting the health care provider. While previously, the employer was barred from contacting an employee's health care provider, the new regulations permit certain company officials, such as legal or human resources professionals, to contact the health care provider. To protect the employee's privacy, the employee's direct supervisors are forbidden from contacting the employee's health care provider.

The new regulations clarify that when an employer believes an employee's medical certification form is incomplete or insufficient, the employer must identify for the employee in writing the precise information believed to be lacking and give the employee a week to provide the additional information.

Under the new regulations, employers may require employees to provide a new medical certification every 12 months for medical conditions that last longer than one year. But if the employee is actually absent, the employer can require new medical certification every six months for ongoing conditions.

Employers are advised to update their FMLA paperwork, including their employee handbooks and notice forms before January 16, 2009 when the new regulations take effect. At the same time, employers should update their handbooks to reflect the changes to the Americans with Disabilities Act that go into effect on January 1, 2009. Thompson Hine's Labor & Employment lawyers can assist employers in updating policies or reviewing changes to policies to be sure they are in compliance with the new FMLA regulations.

#### **FOR MORE INFORMATION**

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