



Labor & Employment Executive Breakfast Meeting

***FMLA Update: Recent Developments, Changes for
Military Families and Hot Topics for 2010***

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Program Outline

- Brief Statutory Overview
- Common Issues From Revised Regulations
- Family Military Leave
- Legislative Initiatives
- Steps To Take Now
- Question & Answer

FMLA Overview: History

- **1993:** Statute enacted
- **1995:** DOL issues first regulations
- **Jan. 2008:** Statute amended to include military family leave
- **Jan. 2009:** DOL issues revised regulations
- **Oct. 2009:** Statute amended to expand military family leave
- **Dec. 2009:** DOL announcement of intention to review FMLA regulations in 2010

FMLA Overview: History

- DOL plan to review FMLA regulations:
“This regulatory initiative assists in achieving the Secretary’s goal of workplace flexibility for family and personal care-giving and, particularly through the job protection and the maintenance of health benefits provisions, helps middle-class families remain in the middle class.”

FMLA Overview: Coverage

- Covered Employer:
 - Public employers
 - Private employers with 50 or more employees
- Eligible Employee:
 - Worked at least 12 months over past 7 years
 - USERRA: including time spent fulfilling military obligations
 - Worked at least 1250 hours in previous 12 months
 - 50 or more employees within 75-mile radius
 - Eligibility may be met during a non-FMLA leave
- State Laws

FMLA Overview: Reasons for Leave

- Because of employee's own serious health condition
- Care for spouse, child, parent with a serious health condition
 - Need not be the only individual available to provide care
- Birth, adoption, foster care placement of a child
- Qualifying exigency arising out of covered active duty of spouse, child, parent
- Care for ill or injured servicemember

Issue: Employer Notice Obligations

- New DOL WH-1420 – FMLA General Notice Poster
 - All covered employers must post; can be done electronically
 - All covered employers with any eligible employees must distribute poster OR include FMLA policy that covers all elements of poster in handbook
 - Practical pointer: if handbook, include calculation of 12-month period, leave request procedures, substitution of paid leave, call-in procedures, medical certification and fitness-for-duty requirements
 - Link: <http://www.dol.gov/whd/regs/compliance/posters/fmlaen.pdf>
- New DOL WH-381 – Notice of Eligibility and Rights & Responsibilities
 - Send within 5 business days of learning of need for FMLA leave, absent extenuating circumstances
 - No longer need for preliminary/conditional designation of FMLA leave
 - Notice of need for certification (15 days) and consequences for failure to submit
 - Link: <http://www.dol.gov/whd/forms/WH-381.pdf>

Issue: Employer Notice Obligations (cont.)

- Written notice of specific deficiencies in certification and opportunity to cure
 - 7 calendar days
 - Contact health care provider for authentication / clarification only after notice of deficiencies
- New DOL WH-382 – Designation Notice
 - Written notice to confirm leave determination and amount
 - Within 5 business days of obtaining information to determine whether leave qualifies
 - Retroactive notice will only be permissible if no prejudice to the employee
 - If fitness-for-duty certification will be required, employee must be informed in designation notice and given essential job functions
 - Link: <http://www.dol.gov/whd/forms/WH-382.pdf>

Issue: Employee Notice Obligations

- Notice sufficient to suggest that leave is needed for a potentially qualifying reason
 - “I am sick” / “I have a headache” may be insufficient
 - Employers may require compliance with usual and customary requirements for requesting leave, absent unusual circumstances
 - Written notice
 - Notice to specific individual
 - If additional leave for previously certified condition, can require reference to FMLA
 - 30 days’ notice of foreseeable leave
 - Notice of need for unforeseeable leave must be given as soon as practicable under the circumstances

Issue: Medical Certification

- New Certification of Health Care Provider Forms
 - DOL WH-380E – Certification of Health Care Provider for Employee's Serious Health Condition
 - Link: <http://www.dol.gov/whd/forms/WH-380-E.pdf>
 - DOL WH-380F – Certification of Health Care Provider for Family Member's Serious Health Condition
 - Link: <http://www.dol.gov/whd/forms/WH-380-F.pdf>
- Certification may be required each leave year
- Recertification may be required once every six months
 - No second or third opinions

Issue: Fitness-for-Duty Certifications

- Employer may require more than simple statement of ability to return to work
- May be required once every 30 days for intermittent leave if reasonable safety concerns exist regarding employee's ability to perform job duties
- Early notice of requirement
 - No later than Designation Notice
- No second or third opinions
- If required and not provided, no reinstatement right

Issue: Light Duty

- Light duty permissible, BUT:
 - Cannot be required instead of FMLA
 - Time spent doing light duty is not FMLA leave
- Employee does not waive prospective rights by accepting light duty work
- Right to restoration held in abeyance during light duty work up to end of applicable FMLA leave year

Issue: Substitution of Paid Leave

- Employee may choose or employer may require
- No distinctions regarding what type of accrued paid leave can be used for what FMLA reason
- If employee choice, must follow employer's paid leave policies to be paid
 - Ex: 2 hours of FMLA leave, PTO in ½ day increments
 - Employer must provide notice of applicable procedures in Notice of Eligibility and Rights & Responsibilities
 - If not followed, still FMLA leave, but not paid
- Employer and employee can agree to supplement disability / workers' compensation benefits with paid leave

Issue: Intermittent Leave

- Increment
 - No longer tied to payroll system
 - Must be consistent with other leave
 - Cannot exceed one hour
- “Reasonable effort” to schedule treatment so as not to disrupt unduly employer’s operations
- Transfer to different position only when leave is foreseeable based on planned medical treatment
- Employer required to track leave and inform employee of amount of leave available
 - Not more than once every 30 days

Issue: Calculation of Available Leave

- **Holiday week**
 - Full week of leave during week containing holiday, holiday counts as FMLA leave
 - Less than full week of leave during week containing holiday, holiday does not count as FMLA leave, unless employee expected to work holiday
- **Overtime**
 - Mandatory overtime missed counts as FMLA leave
 - Voluntary overtime does not count as FMLA leave
- **Average workweek**
 - Scheduled hours over 12 months preceding leave

Issue: Bonuses

- Employer may disqualify employee from bonus premised on achievement of specific goal (attendance, hours worked, etc.) so long as employees on non-FMLA leave are also disqualified

Military Family Leave

- **Jan. 2008:** FMLA amended to add military family leave
 - Qualifying Exigency Leave
 - Military Caregiver Leave
- **Jan. 2009:** Revised FMLA regulations help clarify military family leave provisions
- **Oct. 2009:** DOD Authorization Law amends FMLA to expand military family leave
- **2010:** New regulations to implement 2009 amendments

Two Types of Military Family Leave

- Qualifying Exigency Leave
- Military Caregiver Leave

Qualifying Exigency Leave

- Up to 12 weeks of FMLA leave in a 12-month period
- Because of any “qualifying exigency” arising from employee’s spouse, child, or parent being on active duty or called to active duty for a deployment with the U.S. Armed Forces to a foreign country

What is a Qualifying Exigency?

- (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
- (8) Any event agreed by employer and employee to be qualifying exigency

Notice Requirements for Qualifying Exigency Leave

- If foreseeable, notice must be “as soon as practicable”
- “As soon as practicable” means both possible and practical, considering facts and circumstances
- If not foreseeable? Notice must be provided either same day or next business day
- Content of notice: Sufficient to make employer aware that employee needs FMLA-qualifying leave, and the timing and duration of the leave

Certification of Qualifying Exigency Leave

- Employer may require certification
- Re-certification is not permitted
- Optional DOL form WH384 for leave certification
- Link: <http://www.dol.gov/whd/forms/WH-384.pdf>
- May contact military unit or other third parties to verify meetings, other requirements

Military Caregiver Leave

- Up to 26 weeks of FMLA leave for employee whose spouse, child, or next of kin is a “covered servicemember” of the Armed Forces (Regular or Reserves) in order to care for that servicemember who has suffered a “serious injury or illness” for which he/she is undergoing medical treatment, recuperation, or therapy

Military Caregiver Leave: Who is a Covered Servicemember?

- Active members of Armed Forces (Regular or Reserves)
- Former members (up to 5 years after service period as of start of treatment, recuperation, therapy) (2010 DOD Auth. Law)
- Now includes conditions manifesting after separation from service (e.g., PTSD, Gulf War Syndrome) (2010 DOD Auth. Law)

Military Caregiver Leave: Who is an Eligible Spouse, Son, Daughter or Next of Kin?

- Son and daughter may be any age
- NOK is nearest blood relative, other than servicemember's spouse, parent, child
- Servicemember may "designate" blood relative in writing for purpose of FMLA
- If no designation, multiple NOK at same level of relationship may take leave consecutively or simultaneously

Military Caregiver Leave: What is a Serious Injury or Illness?

- Not the same as a “serious health condition” under FMLA
- Injury/illness either (1) incurred in line of duty or (2) pre-existing and aggravated by active duty service (expanded by 2010 DOD Auth. Law)
- May render servicemember “medically unfit to perform the duties of his or her military position”

Military Caregiver Leave: Medical Certification

- Optional DOL form WH-385
Link: <http://www.dol.gov/whd/forms/WH-385.pdf>
- Unique certification requirements (e.g., incurred in line of duty, medically unfit to perform military position, etc.)
- Specified health care providers may complete (DOD, VA, DOD Tricare, DOD non-network Tricare, DOD-authorized rep.)
- Similar to SHC medical certification as to duration of injury/illness; frequency and duration of leave

Military Caregiver Leave: Medical Certification (cont.)

- Second/third opinions NOT permitted
- Re-certifications NOT permitted
- Invitational Travel Orders/Authorizations must be accepted in lieu of certification
- ITO need only pertain to covered servicemember; no need to name employee
- Employer may require proof of family relationship

Military Caregiver Leave: “Single 12 Month Period”

- 26 weeks of leave in “a single 12 month period”
- 12-mo. period begins on first day of leave
- 12-mo. period is independent of method used for other FMLA leave
- Applies per servicemember, per injury
- No more than 26 weeks of FMLA leave in any one 12-month period

Military Caregiver Leave: Dual Purpose Leave

- If military caregiver leave also qualifies as SHC, dual designation not allowed
- Leave must be designated as servicemember leave first
- Employer may retroactively designate leave as servicemember leave

Military Caregiver Leave: Notice Requirements

- Must give 30 days' advance notice for planned medical treatment
- If foreseeable, but 30 days not practicable, notice "as soon as practicable" (same or next business day)
- If not foreseeable: notice as soon as practicable, depending on facts and circumstances
- Provide sufficient information to make employer aware of need for leave

Recent Legislative Initiative: Military Family Leave Act of 2009

- Amend FMLA to give 2 weeks of unpaid leave before and after deployment of qualified family member
- No “qualifying exigency” required
- Apply to all employees (regardless of hours/time worked) and all employers (regardless of size)

Recent Legislative Initiatives: Balancing Act of 2009

- Incorporates provisions of several bills introduced separately in 2007, 2008 and 2009: Family Leave Insurance Act (H.R. 1723), Family and Medical Leave Enhancement Act (H.R. 824), Domestic Violence Leave Act (H.R. 2515), Healthy Families Act (H.R. 2460 / S.910)
- Federal “Family and Medical Leave Insurance Fund” to finance paid leave
 - Funded by payroll tax on employers and employees (.2% or .1% of earnings)
 - Managed by DOL
- New forms of protected leave: “parental involvement” and “family wellness”
- Require employers with 15+ employees to provide paid sick leave
 - One hour per 30 hours worked, not to exceed 56 hours
 - Paid leave covers recovery from illness, care for family member, doctor’s appointments and preventative care, time spent seeking services for victims of domestic violence, sexual assault, or stalking
- Leave for a wider range of family relations, including domestic partners, same-sex spouses, parent-in-law, adult child, sibling, grandparent
- Expand FMLA coverage for family wellness leaves to employers with 25+ employees
- Expand employee eligibility to employees who work 1,050 hours per year
- Introduced 6/25/2009; referred to subcommittees

Recent Legislative Initiatives: Family and Medical Leave Restoration Act

- H.R. 2161
- Introduced 4/28/2009 by Rep. Carol Shea Porter (D-N.H.)
- Referred to committee 6/4/2009
- Would require Secretary of Labor to revise certain aspects of regulations promulgated in November 2008
- Focus on regulations that have been criticized as restricting employee access to FMLA leave
 - Reverse limitations on use of accrued paid leave
 - Reverse heightened employee notice requirements
 - Reinstate prohibition on direct contact with health care provider
 - Limit employer right to obtain recertification of FMLA-qualifying serious health condition
 - Change rules on increments of FMLA leave
 - Change rules on fitness-for-duty certification for intermittent leave
 - Cost-shifting to employers

Recent Legislative Initiatives: Emergency Influenza Containment Act

- Emergency, temporary measure (2 years)
- Guarantees up to 5 paid sick days per year for work missed because of employer's direction or advice to stay out of work
- Introduced 11/3/2009; House Education and Labor Committee hearing 11/17/2009

Steps To Take Now

- Update FMLA policies
- Update FMLA posters and notices
- Update FMLA procedures
- Train supervisors and human resources
- Continue to be on the lookout for additional changes



QUESTIONS & ANSWERS

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