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Labor & Employment ADVISORY ■

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Department of Labor Issues New FMLA Regulations

The U.S. Department of Labor (DOL) marked the twentieth anniversary of the Family and Medical Leave Act (FMLA) by issuing new FMLA regulations on February 6, 2013. The regulations, which take effect on March 8, 2013, implement several recent statutory expansions of the FMLA pertaining to protections for military family members and airline flight crews. The regulations also clarify DOL's position concerning calculation of intermittent leave and remind employers of their obligation to comply with the confidentiality requirements of the Genetic Information Nondiscrimination Act of 2008 (GINA). This advisory summarizes the most significant aspects of the new regulations.

Military Family Leave

The most extensive changes to the FMLA regulations concern the various forms of military family leave. In general, these changes expand FMLA coverage for family members of covered military servicemembers and veterans.

Qualifying Exigency Leave. FMLA qualifying exigency leave is leave to allow eligible family members of certain military personnel to address issues that arise in connection with certain military deployments. The revised regulations clarify that qualifying exigency leave is available to family members of persons serving in the regular Armed Forces, National Guard or Reserves who are on active duty or called to active duty in a foreign country. The revised regulations increase the maximum number of leave days from 5 to 15 that an eligible family member may take to bond with a military member on short-term, temporary rest and recuperation during deployment. Parental care, a new category of qualifying exigency leave, has been added to the existing categories of leave. Parental care exigency leave may be utilized to make arrangements for care of parents of military members.

Military Caregiver Leave. The regulations also clarify the recent statutory expansions of military caregiver leave, a form of FMLA leave to care for certain military members with serious injuries or illness. Military caregiver leave has been expanded to include leave to care for covered veterans who are undergoing medical treatment, recuperation or therapy for a serious injury or illness. A covered veteran is an individual who was discharged or released under conditions other than dishonorable in the five-year period prior to

the date the employee's military caregiver leave begins. The definition of what constitutes a serious injury or illness of a covered veteran is broad and flexible. Military caregiver leave has also been expanded to include care for pre-existing injuries or illnesses of covered servicemembers that were aggravated in the line of duty. Finally, the regulations provide that military caregiver leave may be supported by a certification from any health care provider.

Intermittent Leave

Through the revised regulations, DOL has also clarified several issues pertaining to the calculation and use of intermittent leave. Consistent with the prior regulations, the revised regulations provide that the maximum increment for FMLA leave taken on an intermittent or reduced schedule basis is the shortest increment of time that the employer uses to account for other forms of leave, provided that it is not greater than one hour. The revised regulations further clarify that this means that an employer must allow FMLA leave to be used in at least one-hour increments and must permit use in shorter increments if shorter increments are permitted for any other form of leave. For example, if an employer accounts for sick leave in 15-minute increments and vacation leave in one-day increments, the employer must allow FMLA leave to be used intermittently in 15-minute increments. If an employer accounts for all forms of leave in one-day increments, FMLA may be used in one-hour increments.

Similarly, employers who account for leave in varying increments at different times of the day or shift may also do so for FMLA leave, provided that the increments used for FMLA are the same as the smallest increment used for any other type of leave taken ***at the same time***. For example, if an employer requires a one-hour increment of leave at the start of the shift and then uses 15-minute increments for leave taken during the shift, then the employer may use the same increments for calculating intermittent FMLA leave. An employer can always account for FMLA leave in smaller increments at its discretion.

DOL also clarified that an employer can only count FMLA leave that is actually taken and may not also include time that is worked for the employer. For example, if an employer typically counts FMLA leave in one-hour increments and an employee arrives at work a half-hour late for an FMLA reason, but the employer waives its policy of counting leave in one-hour increments and puts the employee to work immediately, the employer cannot then deduct a full hour from the employee's FMLA entitlement. In that circumstance, only 30 minutes may be counted.

Where it is physically impossible for an employee to commence or end work midway through a shift, the entire period that the employee is forced to be absent can be counted against the employee's FMLA leave entitlement. The new regulations emphasize that the physical impossibility provision is to be applied in only the most limited circumstance, and the employer must restore the employee to the same or equivalent position as soon as possible.

Recordkeeping Requirements and FMLA Forms

The regulations include a reminder to employers of their obligation to comply with the confidentiality requirements of GINA to the extent that records and documents created for FMLA purposes contain family medical history or genetic information. Under the FMLA and GINA, employee records and documents relating to any medical certification or family medical history must be maintained as confidential medical records in separate files from the usual personnel files, and may only be disclosed under certain limited circumstances.

Curiously, the revised regulations do not address the "safe harbor" language provided by the Equal Employment Opportunity Commission (EEOC) in GINA regulations issued in November 2010. The EEOC, the agency charged with administering GINA, has recommended, among other things, that an employer requesting health-related information from an employee should warn the employee not to provide genetic information. The GINA regulations include safe harbor language for employers to use on health-related forms to protect the employer in the event of inadvertent acquisition of genetic information. DOL has not included this safe harbor language on any of the medical certification forms that have been issued since EEOC published the GINA regulations. DOL did not address this glaring omission in the revised regulations.

In addition to the regulations, DOL has published an updated FMLA poster and has also updated several of its optional-use FMLA forms.

Advice for Employers

Prior to the March 8, 2013, effective date of the regulations, employers covered by the FMLA should review all FMLA policies and forms to ensure that they are consistent with the regulations. Employers should ensure that they are accounting for intermittent leave in increments of one hour, or shorter increments if other forms of leave are permitted in shorter increments. Additionally, employers should ensure that management employees are trained on the expansions of qualifying military family leave, so that potential leave requests can be identified appropriately. Covered employers should also replace their current FMLA posters with the revised poster available on the DOL website and should review recordkeeping maintenance and disclosure policies to ensure compliance with FMLA and GINA.

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