WILLCOX & SAVAGE

EMPLOYMENT LAW OUTLOOK

DOL'S FINAL RULE FOR FMLA REGULATIONS

William E. Rachels, Jr.

The U.S. Department of Labor (DOL) issued its Final Rule for FMLA Regulations on November 17, 2008. The Rules were effective January 16, 2009. The changes in the Regulations were developed through the rule-making process with public comment on proposed changes which were considered in adopting the Final Rule.

In addition to the military exigency leave provisions, the changes are fairly extensive. We present the primary ones here. In the good news column, DOL has issued certain forms which help the processing of leave requests as referenced below.

Employee Rights
Previously, an employee could not waive FMLA rights. Under the Final Rule, employees may waive FMLA rights retroactively but not prospectively in keeping with normal waiver of rights principles.

Bonuses and Awards
Where a bonus or other payment is based on the achievement of a specified goal (such as hours worked or perfect attendance), FMLA absences may be taken into account if absences of employees on an equivalent non-FMLA leave are treated the same.

Employee Notice Requirements
Where the need for leave is unforeseeable, employees are to give notice as soon as practicable. However, if there is a usual and customary leave or absence notification policy, employees are to give such notice within such reasonable time frame as is established by that policy. If timely notice is not given, the period of delay counts as non-FMLA absence.

The employee requesting leave for the first time for a particular FMLA-qualifying reason must provide sufficient information such as the qualifying reason why leave is needed, and the anticipated time and duration of leave if foreseeable in order that the employer can reasonably determine whether FMLA may apply. If there is a subsequent request for leave for the same FMLA qualifying reason

(CONTINUED ON PAGE 2)

DOL ISSUES FMLA MILITARY LEAVE REGULATIONS

Samuel J. Webster

The first amendments to the Family and Medical Leave Act (FMLA), as part of the National Defense Authorization Act for FY 2008, became law, in January 2008, adding two new military-related leaves: qualifying exigency leave and servicemember caregiver leave. As part of the comprehensive revision to the FMLA regulations, the Department of Labor (DOL) recently issued regulations regarding these two military-related leaves. This article explores the highlights of the new regulations: who is covered by the new FMLA provisions, what constitutes qualifying exigency leave, and what qualifies for servicemember caregiver leave.

Qualified Exigency Leave (29 C.F.R. § 825.126)
In response to written comments, including those from Willcox & Savage, DOL has clarified that only family members of persons in Reserve or National Guard units are covered by the qualifying exigency provision, and then only under the immediate circumstances of a call to active duty in support of the contingency operation as defined in Title 10 of the United States Code. The new qualifying exigency leave provision does not apply to family members of Regular Armed Forces personnel.

In all cases, the qualifying exigency must be related to active duty or call to active duty of a member of the Reserves or National Guard. Qualifying exigency leave is available in the following circumstances:

- "Short-notice of deployment" (the covered military member receives seven days or less notice of deployment).
- "Military events and related activities" (ceremony, programs or events sponsored by the military; family support or assistance and informational programs).
- "Child care and school activities" (arrange for alternative child care when the active duty or call to active duty requires a change in existing child care arrangements; provide child care on an urgent, immediate basis when the need arises from the active duty or call to active duty; school or day care enroll/transfer when such is required by the active duty or call to active duty; attend school or day care staff meetings when necessary due to circumstances

(CONTINUED ON PAGE 4)

PRESIDENT OBAMA SUPPORTS PASSAGE OF THE EMPLOYEE FREE CHOICE ACT

Thomas M. Lucas

President Obama has been one of the most prominent supporters of the Employee Free Choice Act (EFCA). He was a co-sponsor of the Bill in the Senate, and has promised his Labor supporters that he "will sign the Employee Free Choice Act into law when I'm President." The Employee Free Choice Act will be a legislative priority in the 111th Congress, for President Obama, and for all U.S. labor organizations. When passed, the EFCA will dramatically tip the balance of power in union organizational campaigns and collective bargaining negotiations toward unions.

Three major changes are proposed under the Employee Free Choice Act.

First and foremost, the "card-check" provisions of EFCA will eliminate employees' right to a secret-ballot election conducted by the NLRB. Instead, unions will be permitted to secure certification as the exclusive bargaining representative by presenting the NLRB with signed "authorization" cards from a simple majority (51%) of employees in the proposed bargaining unit - completely eliminating the opportunity for employees to cast their ballots in secret and for employers to exercise their right of free speech in an election campaign. The NLRB and the courts have recognized such a 'card-check' process as vastly inferior to the NLRB's secret-ballot election process.

Second, EFCA will dramatically shorten the time allowed for companies and unions to bargain an initial collective bargaining agreement, and will impose binding arbitration by a third-party arbitrator if negotiations can't be concluded in that shortened time period. Instead of having a year to negotiate the first contract, after only 90-days of bargaining, the Federal Mediation and Conciliation Service will be assigned to mediate, and that failing, within 30-days, appoint an arbitrator to decide what wage rates, benefits and other conditions will be imposed on the company.

Finally, the penalties available against employers accused of Unfair Labor Practices will be substantially increased to include triple back pay for employees allegedly terminated in violation of the NLRA, and completely-new civil penalties of up to $20,000 for each willful or repeated violation committed by a company. However, EFCA is one-sided in its approach to increased penalties – no similar increase is proposed for liability or penalties for infractions committed by labor unions.

What does the anticipated passage of EFCA mean for employers?

Primarily, it means that 'card-signing' campaigns by labor unions among your employees will be conducted more swiftly and secretly than ever before. Labor unions won't have to secure support from 70-80% of a targeted group of employees to carry them through a 5-6 week campaign and secret-ballot election – they'll only have to convince 51% of the employees to sign a union 'authorization' card and submit those cards to the NLRB. When enough cards are signed, the 'campaign' will be over - perhaps before the company ever knew it had begun!

What actions should you be taking now to ensure that the campaign isn't over before you know it's begun?

1) Review your personnel and labor relations policies and practices to ensure that they are lawful and fairly and consistently enforced.

2) Train your supervisors and managers in the law, the anticipated changes in this area, and their role as good managers in the process.

3) Assess your company's vulnerability to the appeal by an educated, well-trained and motivated labor organizer to your employees. ■

DOL'S FINAL RULE FOR FMLA REGS.

(CONTINUED FROM PAGE 1)

for which leave has previously been provided, the employee should specifically reference the qualifying reason or refer to "FMLA" leave.

When the employee gives sufficient notice that time off may be for a FMLA purpose:

- employer is required to ask employee for any additional necessary information;
- employee must respond to such request;
- employee must consult with employer in advance to make "reasonable effort" to schedule planned treatment so as not to unduly disrupt operations;
- employee must advise employer as soon as practicable when dates of leave change or become known.

Employer Notice Requirements

Posting and Distribution

FMLA poster and policy requirements combined into one new posting called "general notice" that must be posted (hard copy, electronically, or both) conspicuously if employer is covered by FMLA. There is a $110 fine for no poster.

DOL has developed a prototype general notice form (WH Publication 1420). Employer can use it or develop its own form as long as it contains, at a minimum, all information in the prototype form.

The new general notice must be distributed by inclusion in a handbook or other materials that are distributed to all employees.

(CONTINUED ON PAGE 3)

DOL'S FINAL RULE FOR FMLA REGS.

(CONTINUED FROM PAGE 2)

Eligibility Notice from Employer

Employer must notify employee in writing of eligibility or non-eligibility within five business days (absent extenuating circumstances) after the first time in the employer's FMLA's leave year that an employee requests leave for a particular qualifying reason.

DOL has developed a prototype eligibility form (Part A of Form WH-381) which the employer can use or it can develop its own form as long as it contains, at a minimum, all information required by the Regulations.

The leave eligibility notice must state:

- (a) whether or not employee is eligible; and (b) if not eligible, at least one reason why the employee is not eligible (i.e., less than one year of services, does not meet 1250 hour requirement or not working at a site that has 50 or more employees within 75 miles);
- must add ending date for leave;
- if employee has exhausted his/her 12-week FMLA entitlement, that is not a reason for "ineligibility;" instead use new designation notice to deny leave.

Employer must provide written rights and responsibilities notice: (a) each time an eligibility notice is required; (b) if any information on it changes thereafter, within five business days after employee's first request for leave after the changes occur, including reference to prior notice and information that has changed (i.e., method of paying premiums may change if paid LOA becomes unpaid LOA).

DOL has developed a prototype rights and responsibilities notice (Part B of Form WH-381) which is combined on the same form as the eligibility notice (must add ending date of leave due to type on prototype) or employer can develop its own form as long as it contains, at a minimum, all information required by the Regulations.

Rights and responsibilities notice must include numerous pieces of information that are itemized in the Regulations. This information includes:

- employer's designated 12-month FMLA leave year;
- whether certification or other documentation will be required (and attaching it);
- whether employer will require use of paid time off benefits while employee is on leave (and terms and conditions of same);
- whether periodic reports on status and intent to return to work are required.

Designation Notice

The written designation notice must be given within five business days after employer acquires enough information to determine whether leave qualifies or not.

If employer has determined that leave is FMLA-qualifying, the designation notice must include:

- statement that leave is being designated as FMLA leave;
- amount of leave being counted as FMLA leave if known;
- whether paid time off benefits will be used during leave, and if so, that paid leave will count as FMLA leave;
- whether a fitness-for-duty certification (FFD) will be required; and
- whether a list or job description of essential duties is attached for Health Care Providers to use for FFD.

If the employer has determined that leave is not FMLA-qualifying, the employer must so notify the employee in writing (and presumably give the reason it is not qualifying, such as employee has exhausted his/her FMLA entitlement, leave was requested for a non-FMLA reason, or leave not approved for some other reason).

DOL has developed a prototype designation notice (Form WH-382) which states whether the leave is qualifying or non-qualifying and related reasons. The form also provides notice where medical clarification is needed. Alternatively, the employer can develop its own form as long as it contains, at a minimum, all information required by the Regulations.

Medical Definitions

Acute Conditions

A "period of incapacity" exists if: (a) duration of incapacity lasts more than three full consecutive days; (b) there is at least one in-person treatment within seven days of the first day of incapacity; and (c) there is either a regimen of continuing treatment initiated by HCP during first treatment or a second in-person visit for treatment (the necessity of which is determined by HCP) within 30 days of first day of incapacity.

Chronic Conditions

Treatment by health care provider at least twice a year for chronic conditions.

Medical Certification/Clarification

The employee's health care provider may only be contacted by the employer's health care provider, employer's HR professional or a management representative of the employer. The employee's immediate supervisor may not make such contact. ■

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DOL ISSUES FMLA MILITARY LEAVE REGS.

(CONTINUED FROM PAGE 1)

arising from the active duty or call to active duty).

- "Financial and legal arrangements" (making financial/legal arrangements to address the covered military member's absence; transferring bank account authority; obtaining military ID cards; preparing/updating estate plans; representing the covered servicemember before government agencies to obtain, arrange or appeal military service benefits).
- "Counseling" (for the employee, the covered military member or child of the covered military member when the need arises from the active duty or call to active duty).
- "Rest and recuperation" (spending time with the covered military member on short-term R&R; limited to five (5) days).
- "Post-deployment activities" (attending arrival ceremonies, reintegration events and other ceremonies for up to a period of 90 days following termination of the active duty; issues related to death of the covered military member).

Finally, the regulations, having provided in detail for specific instances of qualifying exigency leave, also cover "additional activities as the need arises."

In order to obtain qualifying exigency leave, an employer may require a copy of the Orders showing that the covered military member comes under one of these specific contingency operations specified in both the statute and the regulations.

Servicemember Caregiver Leave (29 C.F.R. § 825.127)

The other amendment allows FMLA leave to care for a "covered servicemember" with a "serious injury or illness." In contrast to qualifying exigency leave, servicemember care leave applies to all of the Armed Forces – Regular, Reserve and National Guard. The serious injury or illness must have been suffered in the line of duty on the active duty for which the covered servicemember is undergoing treatment. The serious injury or illness must render the servicemember medically unfit to perform the duties of his/her office grade rank or rating. The servicemember caregiver leave is limited to "the spouse, son, daughter, or parent or next of kin" of the covered servicemember, and the regulations very carefully define who qualifies, particularly as the spouse or next of kin. The regulations contain a different definition for son or daughter than that applied in the remainder of the FMLA.

While FMLA provides up to 12 weeks of leave in any 12-month period, FMLA servicemember caregiver leave extends to 26 weeks (1/2 year) but for only a single 12-month period. The regulations specify that this leave begins on the first day the employee takes the leave and eligibility therefore ends 12 months later. The regulations explain that servicemember caregiver leave applies on a "per covered servicemember, per injury basis," so that a caregiver may obtain the caregiver leave to care for more than one covered servicemember in the family. The regulations also specify the numerous combinations and permutations of servicemember caregiver leave with other FMLA leave.

Like other FMLA leaves, the new regulations cover certification for qualifying exigency leave and servicemember caregiver leave. The employee requesting qualifying exigency leave should provide a copy of the covered servicemember's orders or other documentation indicating the active duty or call to active duty status in support of a contingency operation and the dates of that status. The employee must also provide a statement of facts supporting the qualifying exigency need; information on the type of qualifying exigency, any available documentation (e.g. copy of the meeting announcement for informational briefing, schedule confirming appointment with counselor or school official), date for the leave and, if for an extended period of time, beginning and ending dates. An employer may require that the employee provide similar information for intermittent or reduced schedule leave, including an estimate of the frequency and duration of the qualifying exigency. The employer may also require verification contact information.

For servicemember caregiver leave, an employee should provide a certification from the health care provider that must include certain "military-related determinations:" whether the injury/illness was incurred in the line of duty on active duty; the approximate date the injury or illness commenced and its probable duration; a sufficient description of medical facts to support the need for caregiver leave; its frequency and duration; the nature of any intermittent or reduced schedule caregiver needs. The DOL has developed forms for both the medical certification and the employee certification for servicemember caregiver leave.

This article highlights the new DOL regulations implementing the most recent military-related amendments to the FMLA. It is, necessarily, only an overview, and the regulations themselves should be consulted in detail in connection with dealing with qualifying exigency or servicemember caregiver leave.

The important point for qualifying exigency leave is that it applies only to employees related to Reserve or National Guard servicemembers who are on active duty or have been called to active duty in support of a contingency operation. These terms are all precisely defined and, therefore, restrict what military-related needs gives rise to qualifying exigency leave. Family members of regular armed forces are not eligible for qualifying exigency leave. The regulations also provide detailed situations for qualifying exigency leave and, notwithstanding the flexibility built into the regulations, those exigencies are limited. The regulations must be consulted in detail for purposes of determining whether qualifying exigency leave is justified.

The regulations for servicemember caregiver leave are likewise detailed. Two important points to remember: servicemember caregiver leave is available up to 26 weeks within only a **single** 12-month period. The DOL permits employers to require fairly detailed medical certification and employee certification in order to obtain servicemember caregiver leave.

Finally, both qualifying exigency and servicemember caregiver leaves dovetail with other FMLA leave provisions, for which both the employer and the employee must also account. ■