

INSIGHTS

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SIGNIFICANT CHANGES TO FAMILY MEDICAL LEAVE ACT (FMLA)

On November 17, 2008 the Department of Labor published its final rule which introduced sweeping changes to FMLA. The new requirements became **effective January 16, 2009** and require all covered employers to review and modify existing FMLA policies and procedures. The following is a brief overview of the final regulation and amendments.

New Military Family Leave Categories

The National Defense Authorization Act of 2008, signed into law by President Bush earlier this year, created two new FMLA categories which must be incorporated into employer policies and procedures. The **Qualifying Exigency Leave** allows an eligible employee to take up to 12 workweeks of unpaid job-protected leave in a 12-month period to manage the affairs of a family member in the National Guard or Reserves who is on active duty in support of a contingency operation. The regulations broadly define eight Qualifying Exigency categories that include: short-notice deployment, military events, child-care and school activities, financial and legal arrangements, counseling, rest and recuperation, post deployment activities, and other reasons agreed to by the employer and the employee.

Military Caregiver Leave entitles eligible employees to take up to 26 workweeks of FMLA job-protected leave in a single 12-month period to care for a family member who is a covered service member that is seriously ill or has been injured in the line of duty. A few key points to note:

- The 26-weeks of leave may be taken intermittently as well as all-at-once.
- An eligible employee may combine other FMLA leave with Military Caregiver Leave, but in no event will be entitled to more than 26 weeks of FMLA leave in a single 12-month period.

Revised Notification Requirements

The final rule modified and expanded the notification requirements for both employers and employees. Key changes include the following:

- Two new DOL forms are available for certifying military family leave.
- Employers must continue to provide each employee with general information about FMLA in a handbook or individual notice at date of hire and must also continue the practice of publicly posting the information (DOL Form WH-1420). When an employee requests a FMLA leave, an Eligibility and Rights and Responsibilities Notice (DOL Form WH-381) must be provided within five business days (previously two business days).
- A Designation Notice explaining to the employee whether a requested leave is covered by FMLA must be provided within five business days after the employer is able to determine if the leave qualifies under FMLA (i.e. after receipt of a completed medical certification). The DOL has provided a model Designation Notice (DOL Form WH-382).

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- Two new medical certification forms have been introduced which replace the existing Certification of Health Provider Form.
- Employees must notify the employer as soon as practicable and must follow the employer's usual and customary call-in procedures when reporting an absence (except in extenuating circumstances). Previously an employee could request a FMLA leave two business days after an absence had commenced. The final rule maintains the consequences if an employee does not give proper FMLA leave notification.

Substitution of Paid Leave

Accrued paid time off can continue to run concurrently with a FMLA leave. The final rule simplifies the procedural requirements and treats all forms of paid leave offered by the employer in the same manner, regardless of the type of leave substituted.

Medical Certification Process

In order to safeguard an employee's HIPAA privacy rights, an employer may not allow an employee's immediate supervisor to contact the health care provider to certify the FMLA leave. A health care provider, human resource professional, a leave administrator or a management official are the only employer representatives permitted to facilitate the medical certification process. Employers are prohibited from asking for additional information beyond what is required on the certification form; however, they are permitted to request recertification of an ongoing condition every six months with respect to an authorized leave. An employee must be given seven calendar days to correct any deficiencies in the medical certification.

Fitness For Duty Certifications

Under the new guidelines an employer may require that this certification specifically address the employee's ability to perform the critical functions of the employee's own job, and if safety is an issue, a Fitness For Duty Certification can be required before an employee returns to work from an intermittent leave.

Next Steps

As initially stated, covered employers need to make substantial changes to their FMLA policies, procedures, and employee communications. While we have highlighted the major points of the ruling, much more information can be found on the Department of Labor Website at www.dol.gov/esa/whd/fmla/finalrule.htm.

For more information, please contact your Chernoff Diamond consultant.

This notice is a brief summary of the changes to the Family Medical Leave Act and is not intended to be a comprehensive legislative analysis. Chernoff Diamond & Co., LLC is a benefits advisory firm and does not provide tax or legal advice. Employers should consult with qualified legal and/or tax counsel for guidance in respect of matters of law, tax and related regulation.