

Benefit Brief



SUBJECT: Family and Medical Leave Act (FMLA) Final Regulations

DATE: December 5, 2008

This Benefit Brief discusses the final revised regulations of the FMLA, which include additional leaves of absence for military family members. FMLA covers private sector employers with 50 or more employees and public agencies.

The Federal Register containing the final FMLA regulations was issued on November 17, 2008 by the Department of Labor Wage and Hour Division.

In our February 2008 Benefit Brief, we informed you that President Bush had signed into law the National Defense Authorization Act, which expanded FMLA to include leaves of absence for employees caring for an injured servicemember and employees who have a family member called to active duty. The DOL has released final revised FMLA regulations that provide guidance on implementing the new military leave benefits, address changes required by court case decisions, and help employers and employees better understand their FMLA rights and responsibilities. The final rules are effective January 16, 2009.

The Family and Medical Leave Act requires covered employers to offer eligible workers up to 12 weeks of unpaid, job-protected leave during any 12-month period to care for a newborn, newly adopted/foster child, or sick family member or because the employee has a serious health condition. Employees are eligible for FMLA leave if (1) they have been employed by an eligible employer for at least 12 months prior to the start of the leave, (2) during the previous 12-month period they worked at least 1,250 hours, and (3) they worked at a location where 50 or more employees are employed within 75 miles. Hourly and part-time employees are also eligible if they meet these requirements.

The expanded FMLA includes the following military leave benefits:

- **Military Caregiver Leave** – provides 26 weeks of unpaid, job-protected FMLA leave during a single 12-month period for a spouse, child, parent, or next of kin to care for a covered servicemember (current member of regular Armed Forces, National Guard, or Reserves) with a serious injury or illness incurred in the line of duty while on active duty. This leave is available on a per-covered servicemember, per-injury/illness basis and the 12-month period must be calculated from the first day of the leave. This means that employers may need to maintain two different systems for tracking FMLA leaves if they use a backward rolling or calendar year method of tracking for other FMLA leaves of absence. In addition, this 26 weeks includes the 12-week leave period for caring for a seriously ill family member if the leave qualifies under both provisions and the employer designates this in the Designation Notice sent to the employee when the leave begins.
- **Leave for Qualifying Exigencies for Family of National Guard and Reserves** – provides 12 weeks of unpaid, job-protected FMLA leave to immediate family members of National Guard and Reserve personnel on federal active duty or call to active duty for qualifying exigencies (short-notice deployment, military events and related activities, childcare and

school activities, financial and legal arrangements, counseling, rest and recuperation, post-deployment activities, and additional activities where the employer and employee agree to the leave).

Additional changes to the FMLA include the following:

- **Forms** – the DOL has changed all of the forms associated with FMLA leave. Sample forms are currently available at the end of the Federal Register document at www.dol.gov/federalregister/PdfDisplay.aspx?DocId=21763 . Forms will be available in late December or early January at www.dol.gov/esa/whd/fmla/finalrule.htm .
- **General FMLA Notice** – Every employer covered by FMLA must post a general notice explaining the Act’s provisions and providing information on procedures for filing complaints for violations of the Act, even if they have no FMLA-eligible employees. The notice must be prominently posted where it can be seen by employees and applicants. (The general notice poster will be available at www.dol.gov/esa/whd/fmla/finalrule.htm .) Electronic posting is sufficient if it meets specific requirements. FMLA-covered employers also must provide this general notice to each employee in an employee handbook or similar written document upon hiring. Employers that do not have an employee handbook or similar written document must distribute a copy of the general notice to each new employee upon hiring.
- **Employee Notice** – an employee is now required to provide notice to the employer of his/her need for leave the same day the employee knows of the need for leave or the next day. In the case of a foreseeable leave, employees must give 30 days’ advance notice.
- **Employer Notice** – the time frame for employers to provide employees with FMLA eligibility and designation notices has been extended from two to five business days.
- **Medical Certification** – employer representatives (but not an employee’s direct supervisor) are now permitted to contact the employee’s or eligible family member’s health care provider directly to get more detailed medical information regarding a serious health condition.
- **Serious Health Condition** is more clearly and specifically defined and adds guidance on some regulatory matters. If an employee is taking leave under the “absence plus treatment” category, the two visits to a health care provider must occur within 30 days of the incapacity, and the first treatment must occur within seven days of the first day of incapacity. “Periodic visits to a health care provider” for chronic serious health conditions is defined as at least two visits per year.
- **Intermittent Leave** – the DOL received numerous comments and complaints from employers and other groups about the difficulty in administering intermittent leave. The revised regulations now require employees to “make a reasonable effort to schedule intermittent leave so as not to disrupt unduly the employer’s operations.” Employers must grant intermittent leave in the smallest payroll increment it uses to account for other leaves.
- **Fitness for Duty** – employers may now ask for a fitness for duty certification for intermittent leave if a reasonable safety concern exists.
- **Overtime** – when an employee is unable to work overtime hours he/she would have been required to work, the time missed will count as intermittent or reduced work schedule FMLA leave.
- **Light Duty** – time spent in “light duty” work does not count against an employee’s FMLA leave entitlement, and an employee’s acceptance of a “light duty” assignment is not a waiver of his/her job restoration rights.

Covered employers need to post the new FMLA general notice and revise their existing FMLA policies, procedures, forms, and employee handbooks to be in compliance by the January 16, 2009 effective date. Plan documents may need to be amended. Employers also must inform their employees of the changes verbally and in writing. Benecon can help employers amend existing policies or create new FMLA policies for employers who do not already have them.

If you have questions about FMLA and the new requirements, please contact Danielle Omans at The Benecon Group at domans@benecon.com, or the number shown below.

This Benefit Brief is provided for informational purposes only and does not constitute legal advice. The Benefit Brief contains only a summary of the applicable legal provisions and does not purport to cover every aspect of any particular law, regulation or requirement. Depending on the specific facts of any situation, there may be additional or different requirements. Please use this Benefit Brief as a guide and not as a definitive description of your compliance obligations.