



## The Department of Labor Publishes Final Rule on the Family and Medical Leave Act

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On November 17, 2008, the Department of Labor ("DOL") published a "Final Rule" that revises regulations interpreting the Family and Medical Leave Act ("FMLA"). Originally enacted in 1993, the FMLA provided employees meeting certain eligibility requirements with the right to take up to 12 weeks of unpaid, job-protected leave during a 12-month period for specified family or medical reasons. In January 2008, amendments to the FMLA added two military family leave entitlements. The Final Rule interprets the 2008 amendments and also makes changes to the regulations that have been in effect since they were issued in 1995. **The Final Rule takes effect on January 16, 2009.**

Highlights of the Final Rule are posted at <http://www.dol.gov/esa/whd/fmla/finalrule/factsheet.pdf> and the full text appears at <http://www.dol.gov/federalregister/PdfDisplay.aspx?DocId=21763>. Some features of the Final Rule include the following.

### Military Leaves

- **Military Caregiver Leave (also known as Covered Servicemember Leave):** Eligible employees who are family members of covered servicemembers can take up to 26 workweeks of leave in a "single 12-month period" to care for a covered servicemember with a serious illness or injury suffered in the line of active duty. This provision extends FMLA protection to additional family members (*i.e.*, next of kin, as defined in the Final Rule) beyond those who may take FMLA leave for other qualifying reasons.
- **Qualifying Exigency Leave:** This leave provides 12 workweeks of FMLA job-protected leave to families of covered military members serving in the National Guard or Reserves to use for "any qualifying exigency," if the military member is on active duty or called to active duty status in support of a military contingency operation. A "qualifying exigency" includes: (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; and (8) additional activities not encompassed in the other categories, but agreed to by the employer and employee.

### General FMLA Revisions

The Final Rule also contains many technical regulatory changes to reflect current law and DOL interpretations that have been handed down since 1995. Here is a brief summary of several of the important revisions.

- **Serious Health Condition:** The six individual definitions of "serious health condition" remain. The Final Rule adds three distinct scenarios that also satisfy the requirements of "serious health condition."
- **Substitution of Paid Leave:** An employee may take, and an employer may require, an employee to take any accrued leave concurrently with any FMLA leave. Under the Final Rule, all forms of leave will be treated the same. An employee electing to use paid leave concurrently with FMLA leave must follow the same terms and conditions of the employer's policy that apply to other employees for the use of such leave. The employee is always entitled to unpaid FMLA leave if he or she does not meet the employer's conditions for taking paid leave. The employer may also waive any procedural requirements for the taking of any type of paid leave.

- **Waiver of Rights: Employees may voluntarily settle or release their FMLA claims without court or DOL approval.**
- **Employee Notice/Call-In:** Employees must now follow an employer's established call-in procedure in connection with an FMLA-related absence, absent unusual circumstances. Failure to follow the employer's procedures will allow the employer to delay or deny FMLA protections.
- **Employer Notice Obligations:** Employers are required to provide employees with various forms of notice, including a general notice about the FMLA through a poster and an electronic posting or an employee handbook upon hire. The time for an employer to provide notice is extended from 2 to 5 days.
- **Penalties:** Categorical penalties were removed. However, an employer may be liable when an employee suffers individualized harm because the employer failed to follow the notification rules.
- **Light Duty:** Time spent performing "light duty" work does not count against an employee's FMLA leave entitlement and the employee's right to job restoration is held in abeyance during that time. If an employee is voluntarily performing light duty, the employee is not on FMLA leave.
- **Medical Certification Process:** In response to privacy concerns, the Final Rule provides that a health care provider, human resource professional, a leave administrator, or a management official (not the employee's direct supervisor) will be allowed to contact a health care provider for medical certification. Employers may *not* ask health care providers for additional information beyond that required by the certification form. If an employer deems a medical certification to be incomplete, the employer must specify in writing what information is lacking and give the employee 7 calendar days to cure the deficiency. Employers may request recertification of an ongoing medical condition every six months in conjunction with an absence.
- **Fitness for Duty:** An employer may now require that the fitness for duty certification specifically address the employee's ability to perform the essential functions of the employee's job. Also, where reasonable job safety concerns exist, an employer may require certification before an employee returns to work when the employee takes intermittent leave.

## Employer Guidance

By January 16, 2009, covered employers must comply with the DOL's Final Rule. Employers should immediately review and update their current handbooks, FMLA policies, forms and procedures to comply with the revised regulations. Employers should also seek training or educational materials for supervisors, HR Departments and leave administrators. By preparing now for these changes, employers may avoid costly mistakes and liability in the near future.

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