

### **FMLA Today**

New federal regulations and legislation relating to the Family Medical Leave Act (“FMLA”) are in effect as of January 16, 2009. These new requirements are extensive and complicated, but they do require basic action that all covered employers (including public employers and those in the private sector with at least 50 employees) must take now.

There is a new Notice of Employee Rights and Responsibilities that must be posted in the workplace *and* either included in an employee handbook for new employees or provided separately to new employees when they are hired. Electronic “posting” may be permissible, but employers with a significant number of workers who are not literate in English will have to provide the notice in a language they do understand. The new notice is available at [www.dol.gov/esa/whd/fmla/finalrule/fmlaposter.pdf](http://www.dol.gov/esa/whd/fmla/finalrule/fmlaposter.pdf).

The new FMLA provisions also grant new leave rights to family members of those in the armed forces, including:

- (1) Up to 12 workweeks of unpaid leave during any 12-month period for otherwise eligible employees (those with at least 12 months of covered employment and at least 1,250 hours of service over the previous 12 months) to assist spouses and immediate family members who are on active military duty by addressing financial and legal arrangements, arranging for alternative childcare, attending certain military events, attending certain counseling sessions and attending post-deployment reintegration briefings.
- (2) Up to 26 workweeks of unpaid leave during any 12-month period for otherwise eligible employees to care for a spouse or immediate family member who is a current service member with a serious injury or illness incurred in the line of duty. Any period of such leave will *not* count towards an eligible employee’s separate entitlement to take up to 12 weeks of unpaid leave to care for a family member with a serious health condition as previously permitted under the FMLA.

Other changes of interest to employers include:

- (a) Employees have to provide 30 days notice of their request to take FMLA leave if it is practicable to do so. The first such request with respect to a particular circumstance does not have to specifically mention “FMLA leave,” but subsequent employee requests relating to the same circumstance must do so.

- (b) Employers now have up to five business days to respond to an employee request for FMLA leave or request medical certification (prior law allowed only two business days).
- (c) A bonus or other payment based on achieving a specified goal (such as hours worked, products sold, or perfect attendance) can be denied to employees who fail to meet the goal as a result of an FMLA leave *unless* it is paid to other employees on equivalent leave status that does not qualify as FMLA leave.
- (d) Spouses with the same employer are limited to a combined period of 12 weeks of FMLA leave during a single twelve month period (26 weeks in the case of a leave to care for an injured service member).
- (e) Missed overtime must be counted as FMLA leave time if the employee misses required overtime because of an FMLA leave.
- (f) Past FMLA claims can be settled without DOL or court approval, a statutory requirement that still applies to any waiver of prospective FMLA rights. Accordingly, releases to be signed by employees in connection with employment severance can be revised to provide for the release of such claims.

*Recommendation:* HR staff and others with responsibility for employee benefit compliance should immediately comply with the notice requirement set out above. Internal FMLA procedures will also have to be adapted to the new regulations, which at over 750 pages in length, are both detailed and complex.

Please contact us if you have any questions or would like to discuss this further.

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