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U.S. Department of Labor Issues Final Regulations on Family and Medical Leave

BY RAYMOND BERTRAND, MARIA A. AUDERO, JAMES P. CARTER AND JULIE D. SCHISLER

On November 17, 2008, the Department of Labor ("DOL") issued final revised regulations implementing the Family and Medical Leave Act of 1993 ("FMLA"). These are the DOL's first changes to the FMLA's regulations in thirteen years. The extensive revisions are the culmination of several events, including U.S. Supreme Court and lower court rulings that invalidated portions of the former regulations, the National Defense Authorization Act, which created two new leave entitlements for family members of military personnel, and the DOL's fifteen years of experience administering the FMLA.

In undertaking these revisions, the DOL sought to improve on regulations that lacked clarity, were not working well, and created friction between employers and employees. While some regulations were kept intact, re-organized or clarified, many were substantively changed. This Client Alert summarizes the significant changes and provides guidance to companies in their compliance efforts.

Covered Employers: Counting Employees for Determining Coverage

The FMLA generally covers employers with 50 or more employees. Increasingly, employers are relying on outside sourcing to help meet their staffing and business needs, and the new regulations have been updated to address this workplace shift.

Joint employment ordinarily exists when a temporary employment agency supplies employees to a second employer. Under the former and new regulations, employees jointly employed by two employers must be counted by both employers in determining FMLA coverage.

The new regulations establish a different rule for Professional Employer Organizations ("PEO"), also known as HR outsourcing vendors, which contract with client employers to perform administrative functions (e.g., payroll, benefits). They clarify that a PEO does not become a joint employer of its clients' employees when it merely performs administrative functions. On the other hand, if a PEO has the right to hire, fire, assign, or direct and control its clients' employees, or benefits from the work that the employees perform, such rights may qualify the PEO as a joint employer.

Employee Eligibility

Employees who work for a covered employer generally are eligible for FMLA leave if they have been employed by that employer for at least 12 months, and worked at least 1,250 hours during the 12-month period immediately before the leave. While the former regulations provided that the 12 months an employee must have been

employed by the employer need not be consecutive, there was ambiguity (and litigation) over what prior employment need not be counted in determining whether the employee is eligible for FMLA leave.

The new regulations resolve this uncertainty by establishing a bright-line rule: employment periods preceding a break in service of more than seven years need not be counted, except where the employer agrees, in writing, to rehire the employee after the break in service.

The new regulations also make clear that breaks in service caused by the employee fulfilling his or her National Guard or Reserve military service obligation must be counted as time worked in determining whether the employee has been employed for at least 12 months by the employer, as is required under the Uniformed Services Employment and Reemployment Rights Act. Likewise, the regulations clarify that the employee returning from leave due to military obligations must be credited, using the employee's pre-service work schedule, with the hours of service that would have been performed but for the period of military service in determining whether the employee meets the 1,250 hour requirement.

New Leave Entitlements: Military Family Leave

On January 28, 2008, President Bush signed into law the National Defense Authorization Act for FY 2008 ("NDAA"). The NDAA expanded the FMLA to allow eligible employees of covered employers to take FMLA leave because of a "qualifying exigency" arising out of the fact that the employee's spouse, son, daughter, or parent is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a "contingency operation" (referred to herein as "qualifying exigency leave").

The new regulations explain that qualifying exigency leave generally only extends to covered family members of military retirees and reservists called to active duty in support of a contingency operation, and not to family members of the Regular Armed Forces on active duty status, nor to family members of servicemembers called to active duty by a State.

In response to public comments requesting greater clarity, the DOL added the statutory definitions of "active duty" and "contingency operation" to the new regulations. Also, because the former regulations defined "son or daughter" to be a person under age 18, or a person 18 years of age or older and incapable of self-care because of a mental or physical disability, the new regulations establish a separate definition of "son or daughter on active duty or call to active duty status." The definition, which applies solely to qualifying exigency leave, does not contain any age limitation. The DOL explained that applying the former definition of "son or daughter" for purposes of leave taken for a qualifying exigency would contradict the intent of Congress.

The NDAA reserved to the DOL the authority to define the term "qualifying exigency." After soliciting public comment, the DOL includes in the new regulations a specific and exclusive list defining "qualifying exigency." These reasons are divided into the following eight general categories: (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.

The NDAA further expanded the FMLA to create one additional leave entitlement for family members of military servicemembers. Under the new law, "an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember shall be entitled to a total of 26 workweeks of leave during a 12-month period to care for the servicemember" (referred to herein as "military caregiver leave").

The new regulations explain that, with military caregiver leave, the definition of "covered

servicemember" includes members of the Regular Armed Forces, as well as members of the National Guard and Reserves. However, former members of the Regular Armed Forces, former members of the National Guard and Reserves, and members on the permanent disability retired list are not considered covered servicemembers.

The new regulations also set forth definitions for "parent of a covered servicemember" and "next of kin," all of which are new terms applicable only to the taking of military caregiver leave by an eligible employee.

Most significantly, the new regulations clarify that military caregiver leave "is to be applied on a per-covered-servicemember, per-injury basis such that an eligible employee may be entitled to take more than one period of 26 workweeks of leave if the leave is to care for different covered servicemembers or to care for the same servicemember with a subsequent serious injury or illness, except that no more than 26 workweeks of leave may be taken within any 'single 12-month period.'" The new regulations provide that "the 'single 12-month period' . . . begins on the first day the eligible employee takes [military caregiver leave] and ends 12 months after that date, regardless of the method used by the employer to determine the employee's 12 workweeks of leave entitlement for other FMLA-qualifying reasons."

Family and Medical Leave Entitlements

The new regulations clarify the following terms, which had caused confusion for employers and employees, resulting in litigation:

Serious health condition: The new regulations provide guidance on two of the six definitions of serious health condition:

First, "incapacity plus treatment," requires three consecutive full calendar days of incapacity, plus treatment by a health care provider. The regulations clarify that "treatment by a health care provider" is satisfied if either: (1) the employee makes two or more visits to a health care provider within 30 days of the start of the period of incapacity, unless "extenuating circumstances" exist; or (2) the employee makes at least one visit to a health care provider, which results in a regimen of continuing treatment under the supervision of a health care provider. In either case, the first (or only) visit to the health care provider must be made within seven days of the start of the incapacity. Only in-person visits qualify. For the second visit to qualify, a health care provider must determine that the second visit is necessary. This requirement is intended to prevent employees from attempting to convert non-serious health conditions into qualifying conditions.

Second, a "chronic serious health condition" is one which: (1) requires "periodic visits" to a health care provider, (2) continues over an extended period of time, and (3) may cause episodic periods of incapacity, such as with asthma or diabetes. The regulations now specify that two visits per year meet the "periodic visits" requirement.

Additionally, although the regulations maintain that conditions such as the common cold, the flu, ear aches, and the like generally do not meet the definition of a serious health condition, the regulations also now clarify that such conditions are not excluded if they otherwise meet the criteria of a serious health condition.

Care of Family Members: The new regulations clarify that where the employee takes leave to care for a family member, the employee need not be the only individual or family member available to care for the individual.

Intermittent Leave: Although no issue drew more comments than the use of unforeseeable intermittent leave, the new regulations revise only the rules regarding administration of intermittent leave. Specifically, the employee's obligation to schedule intermittent leave for planned medical treatment so as not to disrupt the employer's operation has increased from "an attempt" to "a reasonable effort." The DOL

declined requests to further define the term "reasonable effort" in the regulations. However, the commentary explains that "a reasonable effort" depends on the nature of the employee's medical condition, the urgency, nature, and extent of the planned treatment, and the length of the recovery time needed, which is ultimately a medical determination within the purview of the health care provider. The commentary further states that "[i]f it is just a matter of scheduling convenience for the employee, the employee must make a reasonable effort not to disrupt unduly the employer's business operations." In addition, as discussed below under "medical certification," the regulations now provide that employers may (1) show a doctor the employee's pattern of absences and ask if it is consistent with the need for leave; and (2) require a medical certification to estimate the frequency and duration of the episodes of incapacity.

Notice Obligations

The DOL emphasizes in its commentary to the new regulations that a key component of making the FMLA a success is effective communication between employers and employees. To that end, to ensure the employee understands his or her FMLA rights and responsibilities, the new regulations increase the employer notice obligations in several respects.

General Notice: In addition to conspicuously posting a general FMLA notice, the employer now also must distribute the same notice as part of its employee handbook or benefits materials, or at the time of hiring, in either in paper or electronic form.

Eligibility Notice: The employer is responsible for communicating eligibility status to the employee, but now has five business days, rather than two, from the time the employee requests FMLA leave, or when the employer acquires knowledge that the leave may be FMLA-qualifying. The eligibility notice now must inform the employee whether leave is still available in the leave period and, if not, the reasons for the employee's ineligibility (including the number of months/hours worked). If the employee provides notice of a subsequent need for FMLA, but the employee's eligibility status has not changed, no additional eligibility notice is required. However, if the employee's status has changed, then a subsequent eligibility notice now is required within five business days.

Rights and Responsibilities Notice: With each eligibility notice, the employer now also must detail the employee's expectations and obligations, and explain the consequences of failing to meet those expectations. The eligibility notice must include designation information, requirements regarding furnishing medical certifications, payment of premiums for continuing benefits, job restoration rights, and the right to substitute paid leave. In addition, the eligibility notice must inform the employee that he or she may still take the FMLA leave even if the employee does not comply with the paid leave requirements. If the information provided in the rights and responsibilities notice changes, the employer must provide an updated notice within five business days of the change.

Designation Notice: The designation notice now must inform the employee that the leave has been approved and designated as FMLA leave, as well as the number of hours, days or weeks that will be counted against the employee's FMLA entitlement. The employer now has up to five business days, rather than two, after having obtained sufficient information to determine whether the leave qualifies. If the employer requires a fitness-for-duty certification to return to work, notice of that requirement (including in some instances a list of essential job functions) now must be included in the designation notice. If the exact amount of leave is unknown then the employer must provide notice of the amount of leave counted against the employee's FMLA leave entitlement upon request by the employee, but no more than once in a 30-day period and only if leave was taken in that period. To streamline the process, where the employer has adequate information, it now may provide the

employee with a combined eligibility and designation notice. If the information provided in the designation notice changes, the employer must provide an updated notice within five business days of the change.

Retroactive Designation: In *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002), the U.S. Supreme Court struck down a rule in the former regulations that prohibited employers from retroactively designating leave taken by an employee as FMLA leave. Consistent with the *Ragsdale* decision, the new regulations provide that if the employer does not designate leave as required, the employer may still retroactively designate leave as FMLA leave with appropriate notice to the employee, provided that the employer's failure to designate leave does not cause harm or injury to the employee.

Medical Certifications

The employer remains free to designate qualifying leave as FMLA leave without requiring a medical certification. However, there are new rules regarding the timing, content, and procedures for obtaining clarification of a medical certification.

Timing: The employer now generally has five business days, rather than two, after the employee provides notice of the need for leave (or, in the case of unforeseen leave, after the leave commences) in which to request the medical certification. In most cases, the employee must provide the requested certification within 15 calendar days after the request. In addition, the employer now may require annual medical certifications for serious health conditions that extend beyond a single leave year.

Content: The DOL has created two optional sample forms for use in obtaining medical certification. Most significantly, the employer now may require the employee to obtain a medical certification from a health care provider that sets forth a statement of the medical facts regarding the patient's health condition for which FMLA leave is requested. These medical facts may include a description of the symptoms, diagnosis, hospitalization, doctor visits, whether medication has been prescribed, referrals for evaluation or treatment, or any other regimen of continuing treatment. Although permitted under the FMLA, employers should confirm whether state law restricts its right to request such information. For example, California employers should not request a diagnosis, as this is prohibited by the California Family Rights Act.

Additionally, the certification must provide sufficient information to establish that the employee cannot perform the essential functions of the job and the likely duration of such inability. The new regulations also provide some relief to the employer with respect to one of the most pervasive abuses of the FMLA – intermittent unforeseeable leave – by requiring that the certification estimate the frequency and duration of the episodes of incapacity.

An employer still can deny FMLA leave if the certification is "incomplete" or "insufficient," but there has been confusion as to the meaning of these terms. The new regulations provide clarification. A certification is "incomplete" if one or more of the required information elements is not provided, and "insufficient" if the information is vague, ambiguous, or non-responsive. In either case, the employer now must state in writing what additional information is necessary and provide the employee with at least seven calendar days (rather than a reasonable opportunity) to cure the deficiency. If the deficiencies are not corrected, the employer may deny the FMLA leave, unless the seven-day timeframe is not practicable under the circumstances despite the employee's best efforts.

The new regulations also reconcile the FMLA medical certification rules with those of the Americans with Disabilities Act ("ADA") and the employer's own paid leave policies and disability plans. A new provision clarifies that when a serious health condition also may be a disability

under the ADA, the employer may follow the ADA's procedures for requesting medical information and to determine what, if any, accommodations are necessary. That information may be used to determine the employee's entitlement to FMLA leave. The new regulations also dispose of the provision that if less stringent medical certification standards apply to the employer's regular sick leave policies, those standards must be followed when substituting paid leave for FMLA unpaid leave. Instead, the employer now may request additional information in accordance with a paid leave policy or disability plan provided it informs the employee that the additional information need only be provided to receive benefits. Although the employer may deny benefits under its plans if the employee fails to provide such information, such failure may not affect the employee's entitlement to unpaid FMLA leave.

Clarification and Authentication: Under the prior regulations, the employer could contact the employee's health care provider for clarification and authentication only with the employee's permission and through its own health care provider, not directly. The new regulations give the employer more flexibility and define the key terms. The employer now can contact the employee's health care provider directly through a variety of positions, including a human resources professional, a leave administrator, a management official, or the employer's health care provider, but never the employee's direct supervisor. However, the employer may not contact the health care provider until after the employee has had an opportunity to cure the deficiencies.

Contact with the employee's health care provider is limited by the privacy requirements of the Health Insurance Portability and Accountability Act ("HIPAA"). Therefore, the new regulations require the employee to provide the necessary HIPAA consent for such contact. The employee risks losing FMLA protection if the employee fails to cooperate and does not otherwise clarify the certification.

Second and Third Opinions: The second and third opinion rules have not changed much, except that the employee now is required to authorize the release of medical information to the second or third opinion provider. The employer must provide to the employee copies of second and third opinions within five business days, rather than two, of such a request.

Recertification: The recertification provisions are restructured into three time-driven rules: (1) the "30-day" rule provides that the employer may not request recertification more often than every 30 days and only in connection with an absence; (2) the "more-than-30-days" rule provides that, where the certification indicates that the minimum duration of the condition is more than 30 days, the employer cannot request recertification until the longer of that minimum duration or six months; and (3) the "less-than-30-days" rule allows the employer to request recertification within less than 30 days if the employee requests an extension of leave, there is a change in circumstances, or the employer obtains information that casts doubt on the original certification. In seeking recertification, the employer now may provide the health care provider with a record of the employee's absence pattern to confirm whether such a pattern is consistent with the need for leave.

Fitness for Duty: The new regulations clarify that the employee has the same obligations to participate and cooperate in the fitness-for-duty certification process as in the initial certification process. The new regulations also allow the employer to require that the fitness-for-duty certification contain more than a simple statement of the employee's ability to return to work. Under the new regulations, the employer now can obtain a certification that addresses the employee's ability to perform the essential functions of the job. In order to require such a certification, the employer must provide the employee with a list of the essential job functions by the time it provides the employee with the designation notice, and the employer must indicate in the designation notice that

certification must address the employee's ability to perform those essential functions. Employers seeking to clarify or authenticate the fitness-for-duty certification must follow the same rules as for clarifying and authenticating the original medical certification.

While many employers and employer representatives supported establishing a second and third opinion process for a fitness-for-duty certification, the DOL declined to do so, stating such a process would impose a significant burden on the employee and potentially delay his or her return to work from FMLA leave.

Light Duty Positions

While the employer cannot require the employee to perform modified or light duty work in lieu of taking FMLA leave, the employee may voluntarily agree to such arrangements. One issue that was the subject of litigation under the former regulations was whether an employee's FMLA entitlement diminished by the amount of time the employee spent working on a light duty assignment. A number of courts had concluded that such time did count against the employee's leave entitlement. The DOL noted that the holding in these cases was inconsistent with its interpretation of the former regulations. Accordingly, the new regulations clarify that the employee may voluntarily accept a light duty position while recovering from a serious health condition, but the time spent in the light duty position does not count against the 12 weeks of FMLA leave, nor does it affect the employee's reinstatement rights.

To address the administrative difficulties an open-ended light duty assignment presents to an employer, the DOL added a new regulation providing that an employee's right to restoration in his or her prior position or an equivalent position while in a light duty assignment expires at the end of the 12-month period used by the employer to calculate FMLA leave.

Attendance and Production Bonuses

The former regulations distinguished between bonuses for job performance, such as those based on production goals, and bonuses based on the absence of certain events occurring, like bonuses for perfect attendance and for working safely with no accidents. The new regulations dispose of that distinction. If a bonus or other payment is based on the achievement of a specified goal such as hours worked, products sold or perfect attendance, and the employee has not met the goal due to FMLA leave, then the payment may be denied or prorated, unless otherwise paid to employees on an equivalent leave status for reasons that do not qualify as FMLA leave.

Substitution of Paid Leave

Under the former regulations, the employer could not place any limitations on the substitution of paid vacation or personal leave for unpaid FMLA leave. Thus, the employer could not enforce its normal rules regarding the use of paid vacation leave or personal leave when such leave was substituted for unpaid FMLA leave. For example, if the employer's vacation policy required that the employee request vacation two weeks in advance, the employer could not require the employee seeking to substitute paid vacation leave for unpaid FMLA leave to provide the two weeks' notice.

The DOL has reversed its position on the matter of substitution of paid leave and the new regulations provide that the employee's ability to substitute accrued paid leave is determined according to the employer's normal leave policy. If the employee does not comply with the additional requirements in the employer's paid leave policy, the employee is not entitled to substitute accrued paid leave. To assist the employee in understanding his or her obligations, the DOL has added a provision that requires the employer to notify the employee of the conditions related to the substitution of paid leave in the rights and responsibilities notice.

Waiver of FMLA Rights

As a result of confusion regarding the validity of waivers, the new regulations explain that the employer and employee may voluntarily agree to the settlement of past claims without seeking permission from a court or the DOL. Future rights, however, cannot be waived, such as by trading the right to take FMLA leave against some other benefit offered by the employer.

Practical Pointers

Given the vast revisions to the regulations, employers immediately should re-examine their leave policies and practices, forms, supervisor training, and employee communications to ensure compliance.

Employers should be mindful that state law may vary with regard to issues covered in this client alert. Employers are required to follow the more generous state law where applicable.

1. **Revise** general postings and employee handbook leave sections. General notice, eligibility notice, and designation notice forms should be updated to reflect the revisions to the regulations. Consider posting notice electronically on a website that is accessible to all employees.

2. **Revise** related policies, including call-in and reporting procedures, to take greatest advantage of the provisions that allow employers to enforce their paid time-off procedures.

3. **Revise** timelines for the administration of FMLA leave to reflect the revised regulations, including the new employer and employee obligations, and especially the new five-working-day rule for most employer notice requirements.

4. **Create** administrative systems to track the amount of leave that is available and taken, especially in light of the new military leave provisions.

5. **Train** supervisors and managers who will be the first-responders to employees' leave requests to ensure they understand the new rules. Train those evaluating medical certifications to ensure they protect the company's interest by obtaining all permitted information. Be aware of the increased level of accessibility to private employees' medical information, and that the more of that kind of information employers have, the easier it is for employees to assert that their medical issues were at the root of subsequent employment actions.

6. **Update** bonus policies to reflect the employer's ability to prorate or deny payment of attendance, production or safety bonuses to employees taking leave.

7. **Monitor** compliance under the new regulations.

8. **Investigate** all complaints about non-compliance with the new regulations, and about discrimination or retaliation against employees for use of FMLA leave.

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If you have any questions regarding these developing issues, Paul Hastings has lawyers experienced in these matters. We would be happy to assist you with your work to develop, revise, and maintain your policies and procedures in order to comply with the FMLA.

Los Angeles

Maria A. Audero
213-683-6307
mariaaudero@paulhastings.com

New York

Steve Sonnenberg
212-318-6414
stevesonnenberg@paulhstings.com

Orange County

James P. Carter
714-668-6206
jamescarter@paulhastings.com

Julie D. Schisler
714-668-6245
julieschisler@paulhastings.com

San Diego

Raymond Bertrand
858-458-3013
raymondbertrand@paulhastings.com

18 Offices Worldwide Paul, Hastings, Janofsky & Walker LLP www.paulhastings.com

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