



## FMLA UPDATE: FINAL REGULATIONS

Presented by:  
Lynn Schonberg  
Ryan Neumeyer  
Ross, Brittain & Schonberg Co., LPA




1




## Introduction

- Attempts to balance the conflicting interests of employers, employees and health care providers
  - Provide new protections for employers
  - Impose new obligations on health care providers
  - Continue to protect employees on leave




4




## Introduction

- First revisions to the initial set of regulations issued in April 1995
- DOL began working on new regulations in 2002
- Will go into effect January 16, 2009 barring any Congressional action
- Considered the most important labor standard in the US




2




## Introduction

- Download the new regulations at

**[dol.gov/esa/whd/fmla](http://dol.gov/esa/whd/fmla)**




5




## Introduction

- Goal of the new regulations
  - Clarify certain provisions that were in issue
  - Improve communication between employers and employees
  - Provide more guidance for health care community
  - Address the new servicemember amendments to the FMLA




3



## Coverage Issues


- Employers
  - Employ 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year
    - Any person's name on payroll = employee
    - Employees on leave must be counted
    - 20 workweeks need not be consecutive
    - Coverage ends when it no longer employs 50 employees for 20 nonconsecutive workweeks



6

## Coverage Issues


- Joint Employer Coverage
  - Exists where two related companies share employees, ownership, policies, etc.
  - If exists, the two companies are considered one for purposes of many labor laws, including the FMLA
  - New regulations clarify when PEO's are considered a joint employer with client co.



7

## Coverage Issues


- Employee Eligibility
  - New regulations clarify that while the 12 months of employment need not be consecutive, employers need not count a break-in service of 7 or more years
    - This was increased from 5 years in an earlier proposed rule



10

## Coverage Issues


- Joint Employer Coverage
  - PEO is **not** joint employer unless it
    - Exercises control over client's employees,
    - Has authority to hire, fire or supervise, or
    - Benefits from work performed
  - If exists, the primary employer is the client
  - Worksite is primary employer's office unless employee worked greater than 1 year at secondary employer



8

## Coverage Issues


- Employee Eligibility
  - 2 exceptions to the 7 year break-in-service:
    - Fulfillment of military obligations and
    - Periods of approved absences or unpaid leave such as for educational or child-rearing purposes where a written agreement exists obligating re-hire
  - In determining 1250 hour/12 month
    - Time spent fulfilling military service obligations counted towards both requirements



11

## Coverage Issues


- Employee Eligibility
  - Employed for at least 12 months (nonconsecutive) and
  - Employed at least 1250 hours during the 12 month period immediately preceding commencement of leave and
  - Employed at a worksite where 50 or more employees are employed or within 75 miles of that worksite



9

## Coverage Issues


- Employee Eligibility
  - In determining 1250 hours/12 month
    - Restates that eligibility determined at commencement of leave
    - Clarifies that if one is not eligible at beginning of leave and placed on non-FMLA leave, once she meets eligibility requirements she may be placed on FMLA leave and any portion of the leave taken for an FMLA-qualifying reason after the employee meets eligibility would be FMLA leave



12

## Coverage Issues


- Employee Eligibility
  - **Query**
    - Should we consider eliminating any non-FMLA leave for FMLA qualifying reasons?
    - Are employers better protected in terminating ineligible employees in need of FMLA leave?
    - If on non-FMLA leave and not receiving company paid benefits, no obligations to initiate same when FMLA leave begins



13

## Coverage Issues

- Continuing treatment
  - Period of incapacity of > 3 consecutive, **full** calendar days and
  - Subsequent treatment two times within 30 days of the first day of incapacity, unless extenuating circumstances exist
  - Must see, in person, a health care provider within 7 days of first day of incapacity
  - Must visit health care provider



16

## Coverage Issues


- Qualifying reasons for leave
  - Birth and care for newborn
  - Adoption or foster care
  - Care for spouse, son, daughter or parent with serious health condition
  - Employee's own serious health condition
  - Qualifying exigency of spouse, child or parent on active duty
  - To care for injured servicemember



14

## Coverage Issues


- Continuing treatment
  - Requirement that the subsequent treatment occur within 30 days will result in uncertainty as to whether these types of absences count as FMLA leave
  - In these situations, will have to stay final decision for 30 days



17

## Coverage Issues


- Serious Health Condition
  - An illness, injury, impairment or physical or mental condition that involves inpatient care or **continuing treatment**
  - Continuing treatment has been the subject of much debate and litigation
  - New regulations clarify that term



15

## Coverage Issues

- Continuing treatment
  - Also includes pregnancy or prenatal care
    - May take FMLA leave before birth for prenatal care or if she is unable to work
  - Chronic conditions
    - Must visit health provider twice a year
  - Permanent or long-term conditions
  - Conditions requiring multiple treatments



18

## Coverage Issues

- Leave For Pregnancy or Birth
  - Clarifies that a husband may take FMLA leave to care for his expectant spouse if she is incapacitated (includes providing psychological comfort and reassurance)
  - Only a spouse may receive FMLA leave to care for a pregnant woman
    - Boyfriend, fiancé or unmarried father of child not eligible



19

## Employee Leave Entitlements

- Computing FMLA Leave
  - An employee taking full week of FMLA leave during a week containing a holiday will have the holiday counted against his FMLA allotment
  - Holiday is not counted if employee takes less than a full week during holiday week, unless employee scheduled to work on the holiday



22

## Coverage Issues

- Leave For Pregnancy or Birth
  - Clarifies both the mom and dad may take up to 12 weeks of leave to care for newborn with a serious health condition even if both employed by same employer
    - If the baby does not suffer from serious health condition, the mom and dad jointly employed are limited to a combined .12 weeks



20

## Employee Leave Entitlements

- Scheduling Intermittent Leave
  - Employees must make a "reasonable effort" to schedule treatment so as not to disrupt unduly an employer's operations
    - The term "reasonable effort" replaces the work "attempt"



23

## Coverage Issues

- Caring for a Family Member
  - An employee seeking leave to care for a family member need not be the only individual available to care for the covered family member
  - Definition of Health Care Provider
    - Now includes physician assistants



21

## Employee Leave Entitlements


- Transferring on Intermittent Leave
  - Clarify that an employee on intermittent can only be transferred when the need for the leave is foreseeable based on planned medical treatment
  - DOL decided against permitting transfers for unforeseeable intermittent leaves



24

## Employee Leave Entitlements


- Increments of Intermittent Leave
  - An employer may charge an employee with more FMLA leave he needs where he is physically unable to access the worksite after a shift begins
    - Physical impossibility standard
    - Narrow exception
    - Flight attendants, railroad conductors, those employed in sealed clean rooms, etc.



25

## Employee Leave Entitlements


- Increments of Intermittent Leave
  - Potential new policy
    - Any employee who is tardy under one hour cannot begin working until one hour elapses - - can be shorter during the day
    - All leaves are to be taken in increments of no less than one hour



28

## Employee Leave Entitlements


- Increments of Intermittent Leave
  - Clarifies that if unable to work mandatory overtime, can be charged FMLA leave for such overtime
    - Must be mandatory, not merely voluntary



26

## Employee Leave Entitlements


- Substitution of Paid Leave
  - FMLA currently permits substitution of paid leave for unpaid FMLA leave
    - Employee may choose to substitute paid leave
    - Deletes distinctions as to what type of paid leave may be taken for which FMLA reason
    - Employers must still notify employee at beginning of leave



29

## Employee Leave Entitlements


- Increments of Intermittent Leave
  - Employer must account for leave using increments no greater than the shortest period of time employer uses to account for other forms of leave, provided it is not greater than 1 hour
    - No longer tied to payroll system
    - Must apply to all other leaves - - sick, vacation, etc.



27

## Employee Leave Entitlements



- Substitution of Paid Leave
  - Only where the leave is otherwise unpaid
    - Workers' comp and paid disability leave are paid and employer cannot require employee to substitute
    - However, if employee chooses to supplement the comp/disability payments with paid leave, the employer and employee may agree to supplementation



30

## Employee Leave Entitlements



- Substitution of Paid Leave
  - When substituting paid leave, the employer's paid leave policies apply
  - If policy = vacation/personal leave only taken on full day basis, the employee on FMLA leave who may only need 2 hours will be required to full day of vacation or personal time

31

## Employee Leave Entitlements



- Perfect Attendance/Production Bonuses
  - Currently, FMLA leave needs to be excluded from perfect attendance bonuses and production bonuses, thereby forcing many employers to cease such bonuses
  - New regulations permit disqualification of employee who failed to achieve goal due to FMLA leave
    - All employees on equivalent leave status must be treated the same

34

## Employee Leave Entitlements



- Substitution of Paid Leave
  - Potential Policy
    - Vacation and personal time may only be taken in full day increments
    - Sick pay may only be taken in increments of no less than 4 hours

32

## Employee Leave Entitlements



- Perfect Attendance/Production Bonuses
  - If 1800 widgets/year = production bonus, failure to meet due to FMLA OK now
  - If perfect attendance bonus = no missed days but for planned vacation days, FMLA days will disqualify bonus so long as all sick days do too
    - If substitute FMLA leave with paid vacation days, remain entitled to bonus

35

## Employee Leave Entitlements



- Lapsing of Health Insurance Benefits
  - In the event of insurance lapsing due to employee's failure to pay his portion of premium, employer still obligated to reinstate the benefits upon employee's return from FMLA leave
  - Will be responsible for any harm suffered by employee if fails to reinstate

33

## Employer Notice Requirements

- New FMLA Poster (WH1420)
  - Post and distribute general notice
  - Electronic posting adequate
  - Content of Notice must be included in handbook or if one does not exist, provide copy to all new employees
    - Including right to go to Court or DOL
    - Also include no working elsewhere during FMLA
  - See Exhibit 1 (App. C)

36

## Employer Notice Requirements

- Notice of Eligibility and Rights and Responsibilities Form (WH 381) (Ex. 2)
  - Part A - Notice of eligibility
    - Issued within **5 business days** after employer informed of need for leave
    - If not eligible, must provide reason
    - If employee provides notice of subsequent leave for different reason and eligibility unchanged, no new notice required



37

## Employer Notice Requirements

- Penalties for Noncompliance
  - Liable for monetary losses sustained as a result of failure to comply
  - Equitable and other relief, including employment, reinstatement and other relief



40

## Employer Notice Requirements

- Notice of Eligibility and Rights and Responsibilities Form (WH 381) (Ex. 2)
  - Part B – Rights and Responsibilities
    - Submitting medical certification w/in 15 days
    - Requiring substitution of paid leave
    - Maintenance of health benefits
    - Interval of submission of periodic reports
    - Calculation of 12-month period



38

## Employer Notice Requirements

- Retroactive Designation of FMLA Leave
  - Retroactive designation permitted so long as employee not harmed or injured
  - Examples of injury include putting off vacation to undergo needed surgery scheduled later



41

## Employer Notice Requirements

- Designation Notice (WH-382) (Ex.3)
  - Must be provided w/in **5 business days** after receiving sufficient information
  - Provides for indication of
    - Whether paid leave substituted
    - Whether fitness-for-duty certification required
    - Whether job description attached
    - Whether additional information is needed



39

## Employee Notice Requirement

- Notice of need for unforeseeable leave given as soon as practicable under the facts and circumstances
- Compliance with employer's usual and customary notice/procedural requirements for requesting leave
  - Potential policy = written requests or notify specific named individual to inform of leave



42

## Employee Notice Requirement

- Failure to comply with leave procedures can delay or denial of leave request
  - Must be able to prove employee had actual notice of FMLA's notice requirements
- If seek additional FMLA leave for a previously certified condition must specifically make reference to FMLA or the previous condition

43

## Medical Certification

- To Care for Family Member
  - Employer's contact info
  - Info on family member & type of care
  - Dr.'s specialization, fax #, etc.
  - Detailed info on care needed by patient
  - Why intermittent leave medically necessary, detailed info on anticipated frequency and duration of leave

46

## Medical Certification

- The original medical certification form has been separated into one for:
  - Employee's serious health condition – See Exhibit 4
  - Leave to care for family member - - See Exhibit 5

44

## Medical Certification

- Defines an incomplete or insufficient certification
  - Info is vague, ambiguous, non-responsive
- In such case, employer must advise employee **in writing** as to info needed and give **7 calendar days** to submit

47

## Medical Certification

- Employee's Serious Health Condition
  - Employer's contact info
  - Essential job functions/job description
  - Dr.'s specialization, fax #, diagnosis
  - Why intermittent leave medically necessary, detailed info on anticipated frequency and duration of leave
  - Which essential job functions cannot be performed

45

## Medical Certification

- For conditions lasting in excess of one leave year, annual medical certifications may be required
- Specifies and permits employer to consider info obtained via workers' comp, ADA inquiries or disability applications

48

## Medical Certification

- May Now Directly Contact Dr.
  - For purposes of **authenticating** info
    - No need to obtain employee's permission
  - Contact must be made by a health care provider, HR professional, leave administrator, management official
    - Not by direct supervisor



49

## Medical Certification

- Policy Consideration
  - Request, but not require, employees to sign medical release/authorization when they initially request FMLA leave
  - If so, state in writing:
    - To avoid potential delay, please sign the attached medical release to enable us to contact your physician in the event clarification of the Certification of Health Care is required.



52

## Medical Certification

- May Now Directly Contact Dr.
  - For purposes of **clarifying** info
    - Must first obtain employee's permission
    - Failure to permit = denial of leave
  - Contact must be made by a health care provider, HR professional, leave administrator, management official
    - Not by direct supervisor



50

## Recertification

- Requested no more than 30 days
  - In connection with an absence, unless the minimum duration of the condition is more than 30 days
- Requested less than 30 days where
  - Extension of leave requested
  - Significant change in circumstances
  - Employer receives contrary info



53

## Medical Certification

- The 2d/3d Opinion Process
  - Employee must authorize release of medical information
  - Failure to authorize = denial of leave
- Foreign health care provider forms
  - Employee's burden to provide written translation at own cost



51

## Recertification


- Intermittent leaves
  - If in excess of 6 months, every 6 months
  - Employer may also provide dr. with record of employee's absence pattern and ask whether if the serious health condition and need for leave is consistent with such a pattern of absences



54

## Fitness-For-Duty Certification


- Must advise need for FFD cert in Designation of Leave notice (Ex. 3)
- Now may require the doctor to address employee's ability to perform the essential functions of the job
  - But must attach list of essential functions/job description to Designation of Leave notice



55

## Fitness-For-Duty Certification


- Policy Consideration
  - Create job descriptions and ensure the essential job functions are clearly contained
  - Review job descriptions to ensure essential job functions delineated



58

## Fitness-For-Duty Certification

- Intermittent/Reduced leave
  - FFD cert upon return from absence up to once every 30 days **if** reasonable safety concerns exist regarding ability to perform
    - Reasonable belief of significant risk of harm to the employee or others
    - Nature and severity of potential harm and likelihood of occurrence



56

## Military Leave Amendments to the FMLA


Presented By Ryan T. Neumeyer



59

## Fitness-For-Duty Certification


- No 2d/3d Opinions on FFD Certs
- Where proper notice provided and employee fails to submit FFD cert or request additional FMLA leave
  - Employee no longer entitled to reinstatement under the FMLA



57

## Military Leave Under the FMLA

- On January 28, 2008, President Bush signed into law the National Defense Authorization Act (NDAA). The NDAA expands leave rights under the Family Medical Leave Act (FMLA) by providing two types of leave for the family of service members.



60

## How does the NDAA change FMLA leave?

- The NDAA provides up to 26 weeks of leave for employees to care for family members who are injured while in the Armed Forces (effective January 28, 2008); and
- up to 12 weeks of leave for a "qualifying exigency" (takes effect on January 16, 2009).

61

## The Employee Must Be Needed to Care for the Service Member

- Encompasses both physical and psychological care.
- Transportation
- Caring for basic medical, hygienic, nutritional needs, and safety.
- Provide "psychological comfort or reassurance"

64

## Injured Service Member Leave

- A "spouse, son, daughter, parent, or next of kin" can take up to 26 weeks of leave in a 12 month period to care for a service member of the Armed Forces, including the Reserves of National Guard, who is "undergoing medical treatment, recuperation, or therapy for a serious injury or illness."

62

## Who are the "Next of Kin"?

- "Next of Kin" is defined as "the nearest blood relative" of a service member. This applies where an injured or ill service member does not have a spouse, child or parent to care for them and thus needs another family member to provide necessary care.

65

## What is a "serious injury or illness?"

- The term "serious injury or illness" means an injury or illness incurred by the service member on active duty that may render the member medically unfit to perform his/her duties.

63

## Who are the "Next of Kin"

- Blood relatives who have been granted legal custody
- Brothers and sisters, grandparents, uncles and aunts, first cousins
- Blood relative specifically designated by the service member

66

## Who are the "Next of Kin"

- The aforementioned list is prioritized, and therefore if there is no court appointed guardian or the service member has not designated a particular person then brothers and sisters will have priority, next grandparents, then aunts and uncles and finally first cousins.

67

## 26 Weeks of Leave

- Leave is applied on a per-covered-service member, per-injury basis.
- When eligible employee cares for more than one service member or for subsequent injury to the same service member no more than 26 weeks of leave may be taken during a single 12 month period.

70

## Who are the "Next of Kin"

- When an injured service member fails to make a designation and there is more than one family member that fits the definition of "next of kin," all such family members may take FMLA leave to care for the service member either consecutively or simultaneously.

68

## 26 Weeks of Leave

- Employers must designate leave as service member leave when it qualifies as such even if it also qualifies under the provision for leave to care for a family member with serious health condition.

71

## 26 Weeks of Leave

- The leave year is based on a single 12-month period and begins with the first day the employee takes leave.

69

## 26 Weeks of Leave

- An individual who takes leave to care for a service member only gets 26 total weeks of leave during a 12 month period including "regular" FMLA leave and "qualifying exigency leave."
- For example, if Jane takes 16 weeks of leave to care for an injured service member then she would have 10 additional weeks to care for her new born baby.

72

## Certification Requirements

- A separate certification form (Form WH-385) has been drafted by the DOL for employers.
- The employer may request information regarding whether the service member is in need of care.
- The employee taking leave may be required to give the employer confirmation of his or her relationship to the service member.



73

## Qualifying Exigency Leave

- Qualifying exigency leave is not in addition to injured service member leave. Therefore, if Jane has two sons, Bob and Johnny, in the military and Bobby is injured in January for which she takes 16 weeks of leave, she will only have 10 weeks of qualifying exigency leave when Johnny is called to active duty in June.



76

## Recertification

- The provisions of the FMLA relating to obtaining second or third opinions do not apply with respect to leaves to care for ill or injured service members.



74

## What does the term "active duty" mean?

- The term "active duty" means duty under a call or order to active duty during a war or national emergency as declared by the President or Congress.



77

## Qualifying Exigency Leave

- Entitles an employee to take up to 12 weeks of leave due to a "qualifying exigency" arising out of the fact the employee's spouse, child or parent has been called up to active duty.
- This does not apply to employees whose family members are in the regular armed forces.



75

## What are "qualifying exigencies"

- The definition of exigency is the "quality or state of requiring immediate aid or action, or a state of affairs that makes urgent demands."



78

## What are "qualifying exigencies"

- **Short notice deployment** which is defined as a call to active duty seven days prior to the date of deployment (limited to 7 days of leave from the date of notice).
- **Military events and related activities**- Leave to attend (i) any official ceremony, program or event sponsored by the military related to the deployment; and/or (ii) attend family support or assistance programs and informational briefings.



79

## What are "qualifying exigencies"

- To attend **counseling** provided by a healthcare provider for the service member or the service member's child. Leave in regards to counseling cannot be used to attend counseling provided to the employee by his or her healthcare provider.



82

## What are "qualifying exigencies"

- **Childcare and school activities** – allows leave to make arrangements for alternative childcare where necessitated by the change to active duty status by the service member (includes attending conferences and other "meetings with school officials").



80

## What are "qualifying exigencies"

- **Rest and Recuperation** - 5 days of leave to spend time with a service member who is on short term leave (Employee may take up to 5 days of leave for each instance).



83

## What are "qualifying exigencies"

- **Financial and Legal Arrangements**
  - Executing powers of attorney
  - Transferring bank account authority
  - Obtaining military i.d. cards
  - Updating a will
  - Acting as the a service member's representative in order to obtain service benefits while the service member is on active duty and for 90 days thereafter



81

## What are "qualifying exigencies"

- **Attending any ceremonies**, briefings or events sponsored by the military either during active duty status or 90 days thereafter.
- **Funeral arrangements** and any issues that arise because of the death of the service member.



84

## What are "qualifying exigencies"

- **Additional activities** agreed to by both the employee and the employer. Both must also agree to the timing and duration of such leave.
- Generally there must be a relationship between the reason(s) for leave and the active duty or call to active duty.



85

## Certification

- A form titled "Certification for Qualifying Exigency for Military Family Leave" (Form WH-384, has been drafted for employers to use for this type of leave.



88

## Calculating the 12 Month Period for Qualifying Exigency Leave

- The leave year is based on a 12 month period and can be designated by the employer as a calendar year, a fixed twelve month period, or a rolling 12 month period.



86

## Certification

- An employer is permitted to request:
  - Copy of the service member's orders
  - Dates of service members' active duty status
  - Facts regarding the exigency
  - A copy of the service member's orders need only be provided once



89

## 12 Weeks of Leave

- The twelve weeks of leave for a qualifying exigency is to be counted against an employee's leave to care for a family member with a serious health condition or for their own serious health condition.



87

## Certification

- If an employee requests an intermittent/reduced leave schedule then the employer may ask him or her for the beginning and end dates, as well as an estimate of the frequency or duration of the qualifying exigency.



90

## Certification

- If the employee is meeting with a third party (i.e. to arrange childcare or make financial arrangements) he or she must provide detailed information about the third party and nature of the meeting so the employer can verify need for such leave.



91

## Moving Forward

- Revise your company's FLMA policy to conform with the previously discussed FLMA amendments regarding military leave
  - Allowing eligible employees 26 weeks leave to care for sick or injured service members
  - Allowing eligible employees 12 weeks of leave for "qualifying exigencies."



94

## Intermittent Leave

- Both types of military leave maybe taken intermittently or on a reduced leave schedule when necessary.



92

## Substitution with other leave

- For both types of military leave the employee may elect or a employer may require an employee to substitute any accrued
  - paid vacation leave
  - personal leave
  - family leave
  - paid sick leave



93