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Labor Law Bulletin

DOL ISSUES NEW FMLA REGULATIONS

On November 17, 2008, the U.S. Department of Labor (DOL) issued new final regulations interpreting the Family and Medical Leave Act (FMLA). Taking effect on January 16, 2009, the new regulations make a number of significant changes to the existing, original regulations that date back to 1995. Although employers will have more latitude to obtain information from employees and health care providers, employers assume new obligations to inform employees of their rights and responsibilities. And, while the new regulations provide some new tools for preventing employee abuse of the FMLA, the medical conditions and circumstances under which leave may be taken remain broadly defined and intermittent leave will continue to be a challenge for employers.

The most significant changes are:

- **Eligible Employee.** The new regulations retain the requirement that an employee be employed by the company for at least 12 months (not necessarily continuous) and 1,250 hours in the 12 months preceding the request for leave. However, under the new regulations, if there is a break in service of seven years or more, the time prior to the gap is not counted toward the 12-month requirement unless the break is due to military service or the employer agrees to count the prior service.

- **Serious Health Condition.** The same broad definition of serious health condition is retained. However, for a serious health condition involving continuing treatment by a health care provider (as opposed to inpatient care), the new regulations require the employee (or sick family member) to make an in-person treatment visit with the health care provider within seven days of the first day of incapacity. The current regulations contain no such time limit. Also, to qualify as a chronic serious health condition (which often is the basis for intermittent leave), the condition must require at least two visits to a health care provider per year.

- **Employer Notice Requirements.** The new regulations substantially change the manner in which employers must provide notice to employees. The notice obligation is separated into three categories:

  - ***General Notice.*** Electronic posting of the general notice of FMLA rights will now be permissible provided all employees and applicants have access to the electronic posting. Paper posting and inclusion in an employee handbook remain permissible. The new regulations include a prototype notice that employers may use to satisfy this general notice requirement.

  - ***Eligibility Notice and Rights and Responsibilities Notice.*** After receiving notice of an employee's request for leave, employers will have five business days (rather than the current two business days) to notify the employee of his or her eligibility for leave. If the employee is not eligible, the notice must state at least one reason why (e.g., lack of 12 months' service or 1,250 hours; not employed at

a site with 50 or more employees within 75 miles; exhausted 12 weeks of leave). Simultaneously, the employer must provide a notice of rights and responsibilities. The new regulations include a prototype eligibility notice and rights and responsibilities notice that employers may use.

- ***Designation Notice.*** Once the employer has sufficient information to determine if the leave is FMLA-qualifying, it must notify the employee of the designation within five business days (rather than the current two business days). If the employer will require a fitness-for-duty certification to return to work, it must provide notice of that requirement with the designation notice. A list of essential job functions also must be supplied if the employer will require certification of the employee's ability to perform the essential job functions. The new regulations include a prototype designation notice that employers may use.

♦ **Employee Notice Requirements.** The new regulations make several changes to employee notice requirements.

- ***Timing.*** The new regulations retain the existing requirement that employees provide at least 30 days' advance notice if the need for leave is foreseeable, and provide notice as soon as practicable if the need for leave is not foreseeable. The new regulations specify that "as soon as practicable" generally means the same or the next business day. If the employee fails to provide timely notice without reasonable excuse, *or fails to follow the employer's usual notice and procedural requirements for calling in absences or requesting leave*, the regulations now permit the employer to delay the leave.

- ***Content.*** The new regulations specify that the employee must provide sufficient information to enable the employer to determine whether the leave is FMLA-qualifying. Calling in sick without providing more information is insufficient. If the employee fails to respond to the employer's reasonable inquiries for further information, leave may be denied.

♦ **Medical Certification.** The new regulations change the timing, content, mechanics and consequences of noncompliance for the medical certification.

- ***Timing.*** The new regulations increase the employer's time frame for requesting certification from two to five days after the employee gives notice of the need for leave (or the date the employee begins leave if it is unforeseeable). As under current regulations, employees must provide the completed certification form within 15 calendar days unless it is not practicable despite the employee's diligent, good-faith efforts.

- ***Content.*** The content of the certification is changed significantly. Among other changes, the certification now must include the health care provider's specialization, medical facts regarding the patient's condition, and whether intermittent or reduced schedule leave is medically necessary. The new regulations include prototype certification forms.

- ***Incomplete and Insufficient Certifications.*** If the employee provides an incomplete or insufficient certification, the employer must notify the employee, in writing, of the deficiency and give the employee seven calendar days to cure it. Leave may be denied if the employee fails to cure the deficiency.

- ***Authentication and Clarification.*** In a significant change from current rules, the new regulations permit the employer's health care provider, HR professional, leave administrator or management official (but not the employee's direct supervisor) to contact the employee's health care provider

directly to authenticate the certification form or to obtain clarification. The current regulations restrict these tasks to the employer's health care provider.

- **Light-Duty Work.** A controversial and material change is that employers may not charge FMLA time during periods of light-duty work. Instead, the employee's right to job restoration is tolled during the light-duty work. If the light-duty assignment ends before the employee is able to resume his or her regular job, the employee may use the remainder of his or her FMLA leave entitlement. This can have the effect of providing the employee job protection for more than 12 weeks. For example, an employee may take four weeks of FMLA leave, work a light-duty assignment for three weeks and then take eight more weeks of FMLA leave. He would be entitled to reinstatement to his regular job at the end of the FMLA leave—a total of 15 weeks away from his normal job. If the same employee returned to full duty after the four weeks of light duty, he would have used only 4 weeks of FMLA for purposes of calculating his 12 weeks of leave during the one-year cycle. The one limit on this rule is that the employee's right to restoration while on light duty expires at the end of the 12-month leave year that the employer uses to calculate FMLA leave.

- **Production and Attendance Bonuses.** Under the current regulations, an FMLA absence could not disqualify an employee from receiving a perfect attendance award. That has changed. The new regulations provide that bonuses or payments that are predicated on achievement of a specific goal including perfect attendance, hours worked or products sold may be denied if the employee has not met the goal due to FMLA leave. The caveat is that the employer treat employees on non-FMLA leave the same way. For example, if paid vacation does not disqualify an employee from receiving a perfect attendance award, paid vacation used during FMLA leave cannot be considered a disqualifying absence. However, FMLA absences still cannot be held against an employee under an employer's attendance control policy.

- **Release of FMLA Claims.** The new regulations expressly permit employees to settle and release past actual or potential FMLA claims without approval of the DOL or a court. This resolves a split in the federal courts, some of which had held that FMLA claims could not be privately settled or released without DOL or court approval. Employers who removed reference to the FMLA from their release forms because of these court decisions may now re-insert it.

- I**nterpretation of February 2008 Amendment regarding Military Family Leave.** The FMLA was amended in February 2008 to provide leave to employees who provide care for military servicemembers with a serious injury or illness and because of qualifying exigencies relating to military service. See *Labor Law Bulletin* published on February 4, 2008, available on the Vedder Price website. The new regulations explain this amendment by defining "qualifying exigencies" and eligibility requirements.

While these are the most significant changes made by the new FMLA regulations, there are many others—the regulations and the DOL's explanation of them are over 700 pages. Employers will need to update existing FMLA policies, forms and procedures, both to comply with the new regulations and to take advantage of the new tools provided by the regulations to assist employers in curbing abuse of FMLA leave. If any of our clients have questions about the new regulations or need assistance in updating your FMLA program, please contact **Thomas M. Wilde** (312-609-7821), **Bruce R. Alper** (312-609-7890) or any Vedder Price lawyer with whom you have worked.

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