

Advisory

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Changes to the Family and Medical Leave Act

On November 17, 2008, the United States Department of Labor (“DOL”) adopted final revised regulations, effective January 16, 2009, under the Family and Medical Leave Act (“FMLA”). These regulations, which were guided by the DOL’s prior experience under the Act, case law, statutory changes, and public comments, are the first major regulatory updates to the FMLA since the law was enacted by Congress some 15 years ago. This update focuses on the key alterations to the FMLA’s regulatory scheme.

MILITARY-RELATED LEAVE:

The National Defense Authorization Act of 2008 amended the FMLA to create two new leave entitlements: (1) military caregiver leave, and (2) qualifying exigency leave.

- *Military Caregiver Leave* allows an employee up to 26 weeks of FMLA leave to care for a family member injured in the line of active military service. Eligible family members are spouses, parents, children, and “next of kin.” The employee must take the entire leave within 12 months of the first day that the leave began. The leave is applied on a per service member, per injury basis, meaning that the employee can take more than one period of 26 weeks; however, an employee cannot take more than 26 weeks of leave in “a single 12 month period.”
- *Qualifying Exigency Leave* allows an employee up to 12 weeks of FMLA leave because of a “qualifying exigency” associated with the employee’s spouse, child, or parent being on, or called to, active duty in the National Guard or Reserves. The following circumstances qualify as an “exigency”: short notice deployment; military events and related activities; childcare and school activities; financial and legal arrangements; counseling; rest and recuperation; post-

deployment activities; and any other activity mutually agreed to by the employer and employee.

FMLA ELIGIBILITY:

The new regulations also tweaked the rules for determining when a leave qualifies for protection under the FMLA.

- An employee can become FMLA eligible in the middle of a leave, and the employer must tell the employee about any eligibility requirements s/he needs to meet.
- Military service counts toward determining whether an employee satisfies the 12 month/1250 hours requirement.
- For non-consecutive employment periods, an employer must look back seven years to determine whether an employee is FMLA eligible, or indefinitely if the break in service resulted from either military service or a written agreement/collective bargaining agreement.

NOTICE OBLIGATIONS:

The DOL revised the FMLA notification process and expanded the employer’s notice obligations.

- *General notice:* The employer must now post a general notice about the FMLA in a location available to both current and prospective employees, and must either include a copy of this general notice in its employee handbook or distribute a copy to each employee when hired.

In addition, the following notices must be issued within five business days of an employee beginning FMLA leave:

- *Eligibility Notice:* The employer must provide a notice informing the employee that s/he satisfies the statutory eligibility requirements.

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- **Rights and Responsibilities Notice:** The employer must provide a notice detailing the employee's expectations and obligations, and explaining the consequences of failing to meet those expectations.
- **Designation Notice:** The employer must inform the employee that the leave has been approved and designated as FMLA leave, and estimate (the best it can) how much of the FMLA entitlement will be used by the leave.

The new regulation has, however, loosened some other notice-related requirements:

- The employer may now require a fitness-for-duty certificate to specifically address the employee's essential job functions if the employer explains this heightened requirement in the designation notice.
- Retroactive designation of FMLA leave is allowed if the employer provides appropriate notice to the employee and the untimely designation does not harm or injure the employee.
- An employee must provide notice of leave "as soon as practicable." The regulations presume that, in most circumstances, one business day is a practicable length of time.
- An employer may deny leave if the employee's failure to respond to reasonable inquiries prevents the employer from determining if the leave is FMLA qualifying.
- An employer can require the employee to use its "customary notice and procedural requirements" for informing the employer of a FMLA absence (i.e., the employer can require the employee to call a certain person).

SERIOUS HEALTH CONDITION:

The regulations made slight changes to the definition of a "serious health condition."

- If incapacitated for more than three days, the employee must obtain

treatment at least two times within 30 days absent "extenuating circumstances." Additionally, the first visit must occur within seven days after the employee becomes incapacitated. This provision will largely impact employees, such as those living in rural areas, who have limited access to medical treatment.

- Chronic conditions require an employee to see a health care provider at least twice a year.

MEDICAL CERTIFICATION:

The regulations give an employer more leeway to authenticate a medical certification and clarify other related issues.

- If an employee submits a deficient medical certification, the employer must give the employee notice of the deficiency and seven days to correct it.
- If the employee fails to resolve the deficiency in a timely fashion, a human resources professional, leave administrator, health care provider, or management official (not the employee's direct supervisor) can contact the employee's health care provider (with the employee's permission).
- If the employee neither gives permission to contact his/her health care provider nor corrects the deficiencies within seven days of receiving notice of the defect, then the employer can deny FMLA leave.
- The DOL issued two medical certification forms containing a new section for the health care provider to "describe any other relevant facts." The employer can ask for more information, so long as the request does not violate the Americans With Disabilities Act, state worker's compensation laws, or a paid leave policy/disability plan.
- The definition of health care provider now includes physician's assistants licensed to practice under state law.

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OTHER CHANGES:

By way of the new regulations, the DOL has provided clarification on several other aspects of the FMLA.

- Light duty is not considered FMLA leave, and an employer cannot force an employee to accept light duty instead of taking FMLA leave.
- An employer may deny an achievement-based bonus (such as attendance, hours, or production) to an employee who has not met the achievement threshold due to FMLA leave if the bonus policy treats FMLA leave and non-FMLA leave the same.
- An employer can now require an employee seeking to substitute paid leave (vacation and sick time) for FMLA leave to comply with its usual reporting procedures (e.g., a policy requiring an employee to provide two weeks notice for a vacation).
- When an employee takes FMLA leave lasting less than a week, holidays do not count against the FMLA leave entitlement unless they fall on a day that the employee was scheduled to work.
- When planning scheduled medical treatment, the employee “must consult” with the employer and make a “reasonable effort” to schedule the treatment at a time that will not disrupt the employer’s operations.
- An employee can take FMLA leave to care for a sick family member even if other family members are available to care for that person.
- Employees may voluntarily settle FMLA claims without court or DOL approval. Employees, however, still cannot prospectively waive their FMLA rights.

RECOMMENDED MEASURES:

In light of these regulatory changes, employers should consider taking the following steps:

- Revising employee handbooks to reflect the new notice and military leave provisions. Additionally, employers should review all forms and procedures to ensure they are up to date.
- Deciding whether to use the DOL issued forms as is or to customize them to suit employer-specific policies.
- Ensuring that the Federal FMLA poster, *Employee Rights and Responsibilities under the Family and Medical Leave Act*, is displayed in a location accessible to both current and prospective employees.
- Revising policies to take advantage of the more flexible features of the regulations, such as changing bonus policies and requiring employees to follow the “normal and customary” procedures for reporting an absence.
- Avoiding the creation of more stringent requirements for FMLA leave than other types of absences when updating policies. Potentially perilous topics include requirements that the employee pay health insurance premiums during leave, make periodic reports, and furnish documentation such as updated medical certificate or family relationship verifications.
- Educate staff and supervisors about the new regulations.

INTERACTION WITH THE CONNECTICUT FMLA:

Since 1990, the State of Connecticut has maintained its own Family and Medical Leave Act. The state law differs significantly from the federal FMLA in numerous respects, including the definition of covered employers, the definition of eligible employees, the types and length of available leaves, and the pay and benefit obligations of employers with respect to certain types of leaves. Since many Connecticut employers are covered by both the state and federal regulatory schemes, employers must be careful to evaluate their obligations under both

statutes in addressing employee leave requests.

In response to the new federal regulations, the Connecticut Department of Labor issued guidance, effective January 16, 2009, explaining that in some — but not all — cases application of the CT FMLA would follow the new federal regulations. Highlights from the Connecticut Department of Labor’s recent guidance follow.

- Under the CT FMLA and employer may not deny a perfect attendance bonus to an employee who does not have perfect attendance solely because of an FMLA leave.
- The new forms included in the new federal regulations may be used to comply with the CT FMLA. However, they must be altered to ensure both federal and state regulations are stated correctly (e.g., the differences in eligibility requirements must be noted)
- The CT FMLA permits same-sex spouses to take leaves related to pregnancy and birth of a child.
- The CT FMLA requires an employer must use the 16 weeks before the beginning of an employee’s leave period to calculate the average workweek of an employee with a varied schedule. The new federal regulations allow an employer to look at the weekly average over the twelve month period preceding the leave.
- Under the CT FMLA, an employee who accepts a “light duty” position for more than 16 weeks waives his or right to restoration to the same or equivalent position.
- The CT FMLA does not permit an employer to deny an FMLA request for failing to comply with internal notification requirements so long as the employee gives “timely verbal or other notice.”



- Unlike the new regulations, CT FMLA medical certification does not require a “diagnosis” on its medical certification forms.
- The CT FMLA requires the medical certification to be provided to the employer within 2 days as opposed to 5 days under the new federal regulations.
- Under the CT FMLA an employer may not directly communicate with the employee’s health care provider, but must instead employ its own health care provider to make such communications on its behalf.
- The CT FMLA requires that employers furnish second and third opinion reports within 2 days of an employee’s request as opposed to 5 days under the new federal regulations.
- Contrary to the new federal regulations, the CT FMLA allows employers to seek recertification every 30 days without exception.
- Recertification under the CT FMLA is at the employer’s expense if not covered by medical insurance, not the employee’s expense as proscribed under the new federal regulations.
- Unlike the new federal regulations, the CT FMLA does not allow employers to seek a more detailed fitness-for-duty certification addressing whether the employee can perform the essential functions of his or her job.
- Unlike the new federal regulations, the CT FMLA similarly does not permit employers to seek fitness-for-duty certifications for intermittent or reduced schedule leaves.

If you have questions about the new FMLA regulations or their impact on your business, or if you would like assistance in revising your policies and procedures, please feel free to contact any member of our Employment Department.

EMPLOYMENT DEPARTMENT CONTACTS

JOHN G. ZANDY, *Chair*
203.498.4330, jzandy@wiggin.com
KAREN L. CLUTE
203.498.4349, kclute@wiggin.com
SHERRY L. DOMINICK
203.498.4331, sdominick@wiggin.com
MARY A. GAMBARDILLA
203.363.7662, mgambardella@wiggin.com
PETER J. LEFEBER
203.498.4329, plefeber@wiggin.com
LAWRENCE PEIKES
203.363.7609, lpeikes@wiggin.com
JOAN ALLEN ROWE
203.498.4548, jrowe@wiggin.com

RACHEL B. ARNETT
203.498.4397, rarnedt@wiggin.com
JONATHAN M. BARDAVID
203.363.7638, jbardavid@wiggin.com
GREGORY A. BROWN
203.498.4401, gbrown@wiggin.com
MEGHAN D. BURNS
203.498.4382, mburns@wiggin.com
ERICK I. DIAZ
203.498.4462, ediaz@wiggin.com
BRYAN S. WATSON
203.498.4442, bwatson@wiggin.com

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