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New FMLA Regulations

Best Practices to Ensure Family and Medical Leave Act Compliance

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Today's panel features:

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Tuesday, June 23, 2009

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The Military Family Leave Provisions of the Family and Medical Leave Act (FMLA)

By: Victoria A. Lipnic, Esq.

Teleconference Presentation: “New FMLA Regulations: Best Practices to Ensure Family and Medical Leave Compliance”
Tuesday, June 23, 2009

National Defense Authorization Act for FY2008

Section 585(a) of the NDAA amended the FMLA to provide two new leave entitlements to military families:

(1) <u>Qualifying Exigency Leave</u>: Up to 12 workweeks of leave to attend to "any qualifying exigency" (as defined by the Secretary of Labor) arising out of the fact that an 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 support of a contingency operation. *See* 29 U.S.C. 2612(a)(1)(E)

(2) <u>Military Caregiver Leave</u>: An employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember may take up to 26 workweeks of leave in "a single 12-month period" to provide care for the servicemember. *See* 29 U.S.C.2612(a)(3)-(4)

Basic Eligibility Requirements for FMLA Leave

In order to be eligible to take FMLA leave of any type, including military family leave, the following requirements must be met:

Employee Eligibility

- Employed by covered employer
- Worked at least 12 months
- Worked at least 1,250 hours during 12 months preceding leave
- Employed at a worksite with at least 50 employees within 75 miles

Employer Coverage

- Private sector employers with 50 or more employees
- Public Agencies
- Public and private elementary and secondary schools

29 CFR Part 825
The Family and Medical Leave Act of 1993; Final Rule

- Final FMLA regulations published in the Federal Register on November 17, 2008. 29 CFR Part 825
- References to the military family leave provisions are incorporated throughout the final rule.
- Bulk of the military family leave provisions are found in the following sections of the final rule:

  § 825.126 Leave because of a qualifying exigency.

  § 825.127 Leave to care for a covered servicemember with a serious injury or illness.

  § 825.309 Certification for leave taken because of a qualifying exigency.

  § 825.310 Certification for leave taken to care for a covered servicemember (military caregiver leave).

  Appendix G Certification for Qualifying Exigency Leave

  Appendix H Certification for Military Caregiver Leave
- More information on the final regulations can be found on the DOL website at http://www.dol.gov/esa/whd/fmla/finalrule.htm

Qualifying Exigency Leave

- An eligible employee of a covered employer may take leave for 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 support of a contingency operation. 29 U.S.C. 2612(a)(1)(E)

- Law provides for up to 12 workweeks of leave in a FMLA leave year for qualifying exigencies. Leave may be taken in a block, intermittently or on a reduced leave schedule.

Eligibility for Qualifying Exigency Leave

Eligible employees must have a family member who is a "covered military member."

- Covered Military Members: Employee's spouse, son, daughter, or parent on active duty or call to active duty status in support of a contingency operation

- Regulations provide special definition for son or daughter on active duty or call to active duty status

"Active Duty Status" for Qualifying Exigency Leave

- By statute, leave is only available to family members of National Guard and Reserve and certain retired members of the Regular Armed Forces who are on active duty status in support of a contingency operation
- NDAA defines active duty as duty "under a call or order to active duty" under a provision of law referred to in section 10 U.S.C. 101(a)(13)(B).
- Members of the Regular Armed Forces are not identified in the provisions of law referred to in 10 U.S.C. 101(a)(13)(B)
- State calls to active duty generally not covered

Active Duty Status in Support of a Contingency Operation for Qualifying Exigency Leave

A "contingency operation" under 10 U.S.C. 101(a)(13)(B) means a military operation that "results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12305, or 12406 of this title, chapter 15 of this title, or any other provision of law during a war or during a national emergency declared by the President or Congress."

- **10 U.S.C. 688** (which authorizes ordering to active duty retired members of the Regular Armed Forces and members of the retired Reserve who retired after completing at least 20 years of active service)
- **10 U.S.C. 12301(a)** (which authorizes ordering all reserve component members to active duty in the case of war or national emergency)
- **10 U.S.C. 12302** (which authorizes ordering any unit or unassigned member of the Ready Reserve to active duty)
- **10 U.S.C. 12304** (which authorizes ordering any unit or unassigned member of the Selected Reserve and certain members of the Individual Ready Reserve to active duty)
- **10 U.S.C. 12305** (which authorizes the suspension of promotion, retirement or separation rules for certain Reserve components)
- **10 U.S.C. 12406** (which authorizes calling the National Guard into federal service in certain circumstances)
- **10 U.S.C. chapter 15** (which authorizes calling the National Guard and state military into federal service in the case of insurrections and national emergencies)

Categories of Qualifying Exigencies

- Short-notice deployment
- Military events and related activities
- Childcare and school activities
- Financial and legal arrangements
- Counseling
- Rest and recuperation
- Post-deployment activities
- Additional activities where employer and employee agree

Certification for Qualifying Exigency Leave

Copy of Active Duty Orders and Dates of Active Duty Status

- Employer may require copy of orders or other documentation from military first time qualifying exigency leave requested

Certification of Each Qualifying Exigency

- Employer may require employee to provide statement of appropriate facts
  - ☐ Date exigency will commence
  - ☐ Beginning and end date of absence if block leave taken
  - ☐ Frequency and duration of exigency if leave taken intermittently
  - ☐ Any available written documentation
  - ☐ Contact information if meeting with a third party
- DOL has developed an optional certification form (WH-384)

Verification of Need for Qualifying Exigency Leave

Verification

- Employer may verify nature of meeting or appointment and schedule with third party
- Employer may verify covered military member's active duty status with DOD

Confirmation of Covered Family Relationship

- Employer may require reasonable documentation of employee's relationship to covered military member
- May be simple statement from employee

Military Caregiver Leave

- An eligible employee who is the spouse, son, daughter, parent, or next of kin (nearest blood relative) of a "covered servicemember" may take job-protected FMLA leave to care for the servicemember

- Law provides for up to 26 workweeks of leave during a "single 12-month period" to care for the seriously injured or ill servicemember. Leave may be taken in a block, intermittently or on a reduced leave schedule

Eligibility for Military Caregiver Leave

Eligible employees must be the spouse, son, daughter, parent, or next of kin (nearest blood relative) of a "covered servicemember" with a "serious injury or illness"

- **Regulations provide special definitions for son, daughter or parent of a covered servicemember**
- **Regulations define next of kin broadly**

- **Next of kin is the covered servicemember's nearest blood relative, other than the servicemember's spouse, parent, son, or daughter, in the following order of priority: blood relatives who have been granted legal custody of the servicemember, brothers and sisters, grandparents, aunts and uncles, and first cousins, *unless* the covered servicemember has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave, in which case the designated individual shall be deemed to be the covered servicemember's next of kin.**

- **All family members sharing the closest level of familial relationship to the covered servicemember shall be considered the covered servicemember's next of kin (unless there is a designation). For example, if the covered servicemember has not designated a next of kin for military caregiver leave purposes and has three siblings, all three siblings will be considered the covered servicemember's next of kin.**

"Covered Servicemembers" for Military Caregiver Leave

- Covered servicemembers include members of the Regular Armed Forces, the National Guard or Reserves, who are undergoing medical treatment, recuperation, or therapy, are otherwise in outpatient status, or are otherwise on the temporary disability retired list (TDRL), for a serious injury or illness

- Former members of the Regular Armed Forces, the National Guard or Reserves, and members on the permanent disability retired list (PDRL) are not considered covered servicemembers

"Serious Injury or Illness" for Military Caregiver Leave

Serious Injury or Illness means:

an injury or illness incurred by the member in the line of duty on active duty that may render the member medically unfit to perform the duties of the member's office, grade, rank, or rating

"Single 12-month Period" for Military Caregiver Leave

Military Caregiver Leave Must Be Taken in a "Single 12-Month Period"

- ☐ Begins on first day employee takes military caregiver leave
- ☐ Ends 12 months after that date
- ☐ Leave does not carry-over to another 12-month period

Per Servicemember/Per Injury Entitlement

Per Servicemember Entitlement:

- May take 26 workweeks of leave to care for different covered servicemembers in different "single 12-month periods"
- May care for two covered servicemembers at same time as long as no more than 26 workweeks of leave are taken during any "single 12-month period"

Per Injury Entitlement:

- May take 26 workweeks of leave to care for same covered servicemember with a subsequent serious injury or illness

Per Injury Entitlement Coverage and Limitations

Per Injury Entitlement Covers:

- Second serious injury or illness incurred in line of duty on active duty (e.g. servicemember is redeployed and incurs another injury)

- Manifestation of a second serious injury or illness at a later time (e.g. servicemember incurs leg injury and later manifests a traumatic brain injury from same incident)

Per Injury Entitlement Does Not Cover:

- Later aggravation or complication of earlier serious injury or illness

Certification for Military Caregiver Leave

Employer may require employee to obtain certification completed by covered servicemember's authorized health care provider

- Authorized Health Care Providers:
  (1) a DOD health care provider;
  (2) a VA health care provider;
  (3) a DOD TRICARE network authorized private health care provider; or
  (4) a DOD non-network TRICARE authorized private health care provider
- Healthcare provider is permitted to rely upon determinations from an authorized DOD representative (such as a DOD recovery care coordinator) if unable to make certain of the military-related determinations (e.g. injury incurred in line of duty on active duty)
- Special Rule for Invitational Travel Orders/Authorizations
- DOL has developed an optional certification form (WH-385)

Verification of Need for Military Caregiver Leave

Verification

- Employers may authenticate and clarify military caregiver leave certifications and ITOs/ITAs
- Recertifications, second and third opinions are not permitted

Confirmation of Covered Family Relationship

- Employer may require reasonable documentation of employee's relationship to covered servicemember
- May be simple statement from employee

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Processing an FMLA Request Under the New Regulations

Teleconference Sponsored by Strafford Publications, Inc. on "New FMLA Regulations: Best Practices to Ensure Family and Medical Leave Act Compliance"

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The Process

- Employee asks for leave
- Employer gives employee Eligibility Notice
- Employer gives employee Rights and Responsibilities Notice
- Employee provides certification
- Employer gives employee Designation Notice

Note: forms can be accessed at www.dol.gov/esa/whd/fmla/

Employee Obligation to Give Notice For Foreseeable Leave

- Employee must give oral or written notice at least 30 days in advance, or as soon as practicable.
- As soon as practicable usually means the day the employee learns of the need for the leave or the next business day.
- If employee doesn't give at least 30 days' notice, employer may ask for explanation and employee must respond.

Employee Obligation to Give Notice For Unforeseeable Leave

- Employee must give notice “as soon as practicable,” which generally should be consistent with the employer’s usual policies.

Content of Employee Notice

- Enough information for employer to determine that the leave might be FMLA qualifying.
- Employer must inquire if it appears that reason may be FMLA qualifying, and employee must respond to employer's reasonable request for information.
- If reason for leave is same as reason for a previously granted FMLA leave, employee must specify reason or specify that employee is requesting FMLA leave.
- For unforeseeable leave, employee saying that he or she is "sick" is not enough information to put employer on notice.

Employee Obligation to Comply With Employer Policies

- Employees can be required to comply with employer's customary policies regarding requesting leave.
- But, employer policies can't be stricter than FMLA regulations and can't discriminate against employee who asks for FMLA leave.
- Employer may waive some requirements of its policies but it should be consistent.
- Call in procedures: employer can require that employee contact a specific individual to give notice and, absent unusual circumstances such as inability of employee to reach that person, employee can be denied FMLA leave for failure to contact the designated individual.

Employee Failure to Comply With Employer Policies

- Employer may delay or deny leave for failure of employee to give proper notice, absent unusual circumstances.

- For employer to impose sanctions, it must be able to show that employee had actual notice of requirements. Complying with general FMLA notice requirements (poster, handbook) is sufficient.

Employer Response: Eligibility Notice

- Notice tells employee if eligible or not for FMLA leave (12 months; 1,250 hours; 50 employees).
- Employer must notify employee of eligibility **within 5 business days** of employee's request or of employer learning that leave may be covered by FMLA, unless there are extenuating circumstances.
- Eligibility notice can be oral or in writing but should be mailed to the employee if the leave has already started.
- If the employee is not eligible for FMLA leave, the eligibility notice must specify at least one reason why the employee is not eligible.

Employer Response: Eligibility Notice (2)

- If a "significant portion" of the workforce is not literate in English, the notice must be in a language in which the employees are literate.
- Subsequent request for leave in 12 month period for different reason:
  - New notice not needed if eligibility has not changed.
  - New notice needed if employee is no longer eligible for FMLA leave.
- All absences for the same qualifying reason are considered a single leave and employee eligibility does not change during the 12 month period.

Employer Response: Rights and Responsibilities Notice

- Must be given to employee whenever an eligibility notice required.
- Certain information must be provided, but employer can add more.
- If information on rights and responsibilities notice changes later, a new notice must be given **within 5 business days** of the change.
- Can be delivered electronically.
- Can use the DOL form for both Eligibility and Rights and Responsibilities Notice (DOL form WH-381)

Employer Response: Rights and Responsibilities Notice (2)

- If employer doesn't use the DOL form, notice must contain specific expectations, obligations, and consequences of failure to meet obligations, including, at a minimum (when appropriate):
  - That the leave may be designated and counted against employee's FMLA leave entitlement;
  - The applicable 12 month period;
  - Any requirements for certifications (e.g., medical – for serious health condition);
  - Employee's right to substitute paid leave;
  - Requirements for substituting paid leave (and informing employee that he/she is still eligible for FMLA leave if employee does not substitute paid leave);

Employer Response: Rights and Responsibilities Notice (3)

- Continued (Rights and Responsibilities requirements)
  - How employee is to pay health insurance premiums and the consequences of failure to make premium payments;
  - Employee's liability for payment of health insurance premiums if employee fails to return to work;
  - If the employee is a "key employee"; and
  - Employee's right to maintenance of benefits when on leave and right to be restored to an equivalent position upon return.

Medical Certifications (1)

- Employer makes request **within 5 business days** after employee requests leave; usually done via Rights and Responsibilities Notice.
- Must give employee at least 15 calendar days unless it isn't practicable for employee to meet that deadline despite employee's diligent efforts.
- DOL has new certification forms for employee's own serious health condition (DOL form WH-380-E) and for the serious health condition of family member (DOL form WH-380-F)

Medical Certifications (2)

- Employee must provide a “complete and sufficient certification” or must provide the employer with authorization for the health care provider to release certification to the employer.
- But, it is always the employee’s responsibility to provide the employer with a “complete and sufficient certification.”
- If certification is incomplete or insufficient, employer must notify employee in writing of what additional information is needed.
- Certification is incomplete if an entry is blank.
- Certification is insufficient if information is “vague, ambiguous, or non-responsive.”

Medical Certifications (3)

- Must give employee at least 7 calendar days to cure any deficiency in the certification unless that is not practicable despite employee's diligent efforts.
- May deny FMLA leave if the deficiencies in the certification are not corrected, or there is no resubmitted certification.
- Must follow HIPAA Privacy Rule if certification contains individually-identifiable information created or held by a HIPAA covered health care provider.
- Employer can request a certification once each year if the need for leave lasts beyond a single leave year.

Authentication or Clarification of Medical Certification

- Employer may contact health care provider for
  - authentication (i.e., verifying that the health care provider completed and signed the certification) or
  - clarification (i.e., understanding the handwriting or understanding the meaning of a response) **but only after giving employee a chance to clarify.**
- Employee must authorize employer to contact health care provider or must provide the clarification requested by the employer, but employee authorization not needed for authentication.
- Employer's health care provider, human resources professional, leave administrator, or manager, **but not employee's supervisor**, may contact employee's health care provider.

Employer Response: Designation Notice

- When employer has enough information to know whether leave is for an FMLA qualifying reason (e.g., after getting a sufficient medical certification), it must notify the employee **within 5 business days.**
- Employer must notify employee whether employee has FMLA time available and whether leave does or does not qualify as FMLA leave.
- Notice must in writing.
- Notice must be given again, within 5 business days, if information changes, such as when the employee runs out of FMLA leave.
- DOL has a form that can be used for this purpose (DOL form WH-382).

Employer Response: Designation Notice (2)

- If you do not use the DOL form, you must state the following:
  - Whether you will require a fitness for duty certification. If so, you must inform employee of essential functions if you want the certification to address employee's ability to perform essential functions.
  - Whether you will require, or the employee requested, that paid leave be substituted for unpaid leave.
  - How much FMLA time the employee will use (if it is possible to make that determination). This can be done orally, but must be confirmed in writing no later than the next payday.
    - If employer doesn't know how much FMLA time the employee will use, employer must provide information to employee upon employee's request, but not more often than once every 30 days.

Recertification

- Employer can ask for a recertification once every 30 days but only in connection with absence by employee.
- However, if original certification indicated that the duration of the condition will be more than 30 days and the leave involves absence of the employee, employer must wait until minimum duration has expired (but employer can always ask every 6 months).
- Employer does not have to wait 30 days if:
  - employee asks for an extension of leave; or
  - circumstances in original certification have changed significantly (e.g., medical condition seems worse, or employee has pattern of taking unscheduled FMLA leave in conjunction with other days off); or
  - employer "receives information that casts doubt upon the continuing validity of the certification."

Fitness for Duty Certification

- If an employee uses intermittent leave and the employer has reasonable safety concerns, the employer may require a fitness for duty certification up to once every 30 days.
- Insistence on fitness for duty certification must follow uniform policy.
- Employer is entitled to a certification, rather than the current "simple statement" from the health care provider.
- Employer **must** provide a list of essential functions at the time of providing the designation notice if employer wants the fitness for duty certification to address employee's ability to perform the essential functions of employee's position.

Employer Failure to Follow 3 Notice Requirements

- Employer failure to follow the notice requirements could be deemed to be unlawful interference with, restraint, or denial of the exercise of an employee's FMLA rights, but the employee would have to prove actual harm to the employee.

- However, employer can retroactively designate leave as FMLA leave so long as employee does not suffer harm as a result.

Other

- If there is a disagreement as to whether the leave is FMLA qualifying, it should be resolved through employer-employee discussions which should be documented.

- Nothing in the FMLA regulations prevents an employer from following appropriate procedures for requesting information in connection with the Americans with Disabilities Act.

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Overview Regarding 2009 Changes to Substantive FMLA Regulations

Presented as part of a teleconference on "New FMLA Regulations: Best Practices to Ensure Family and Medical Leave Act Compliance."

Sponsored by Stafford Publications, Inc.

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Introduction

- The DOL issued new regulations under FMLA on November 17, 2008.
- Those changes go into effect on January 16, 2009.
- The new regulations fall into three equally significant categories:
  - (1) rules that apply to new military FMLA;
  - (2) changes to the steps of the FMLA certification process; and
  - (3) substantive changes to other existing FMLA regulations.
- These slides will focus on the third category: *i.e.*, the substantive changes to the FMLA regulations.

Introductory Notes

- Citations to the relevant regulations are provided, using the number which follows *29 C.F.R. §825.*
- Many issues that were previously covered in a particular FMLA regulation have now migrated to a new regulation section and number.
- As before, the Comments to the regulations matter, and provide substance and illumination.
- Most of these substantive changes appear in Subparts A (coverage) and B (leave entitlements) of the FMLA regulations.

Employer Notice Posting Requirements

- Every employer must post an FMLA Notice where it can be seen by all employees and applicants. *.300(a)(1)*
- The posted Notice must explain the FMLA's provisions and provide information for making a complaint to the DOL. *.300(a)(1)*
- The employer may use electronic posting in its efforts to meet this requirement. *.300(a)(1)* However, it will also have to do a paper posting if some employees do not have access to that electronic posting or "are not able to access the information electronically." *See Comments to .300*
- If all employees -- but not all applicants -- can access this information electronically, the employer will still need to post a paper notice where notices for applicants are customarily posted. *See Comments to .300*

Employer Notice Distribution Requirements

- In addition to the paper posting, every employer should also provide the FMLA Notice in its employee handbook or other written guidance to employees concerning employee benefits or leave rights. *.300(a)(3)*
- If there are no such handbooks or written materials, the employer must distribute this notice to each new employee upon hiring. *300(a)(3)*
- This distribution may be accomplished electronically. *.300(a)(3).*

PEOs/Joint Employer Issues

- PEOs (Professional Employer Organizations) contract with client employers to perform administrative functions such as payroll, benefits, etc.
- A PEO will not be deemed to have entered into a joint employment relationship with the employees of its client companies when it merely performs administrative functions. *.106(b)(2)*
- A PEO will typically only becomes a joint employer if it has the right to hire, fire, assign, or direct and control the client's employees, or benefits from the work that they perform. *.106(b)(2)*

Employer Eligibility

- In determining whether an employee has been employed for 12 months, the employer may (if it does so for all employees with similar breaks in service) refuse to count time worked time prior to a break in service of 7 years or more. *.110(b)(1)*
- There are two exceptions where older time must be counted:

  (1) where the break was occasioned by National Guard or Reserve military service; or

  (2) where there is a written agreement, such as a CBA, which states the employer's intent to rehire the employee after a break in service. *.110(b)(2)*
- Worksite for a telecommuter for purposes of FMLA = the office to which the employee reports and from which assignments are made. *.111 (a)(2)*
- If a joint employee has physically worked for at least one year at a facility of the secondary employer, then that facility = the employee's worksite under the FMLA. *.111(a)(3)*

Definition of "Serious Health Condition"

- Physicians assistants now qualify as "health care providers." *.125(b)(2)*
- The typical way for an employee who has not been an in-patient to show he has a serious health condition is to show "continuing treatment by a health care provider." *See .113(a*).
- There have always been different ways to do that, including incapacity and treatment, pregnancy or prenatal care, chronic conditions and permanent or long-term conditions.
- There is now more clarity re what is "continuing treatment" for purposes of "incapacity and treatment" and "chronic conditions."

Definition of "Serious Health Condition"

- *Incapacity and treatment*. There must be a period of incapacity of more than three consecutive, *full* calendar days. *.115(a)* In addition:
  - The treatments must be in-person. *.115(a)(3)*
  - The first treatment must take place within 7 days of the first day of incapacity. *.115(a)(3)*
  - When the employee tries to show "treatment two or more times" by a health care provider, those two treatments must both occur within 30 days of the first day of incapacity, unless extenuating circumstances exist. *.115(a)(1)*
  - The health care provider, not the employee/patient, determines if the second visit is needed. *.115(a)(4)*

- *Chronic conditions*.
  - In order for the condition to qualify as chronic, the employee has to make at least 2 visits per year to the doctor's office for treatment. *.115(c)(1)*

Pregnancy/Childbirth/ Bonding Leave

- The 12 week combined limitation on FMLA leave to be taken by a husband and wife employed by the same employer applies even though they work more than 75 miles apart and even though they work for two different operating divisions of the same company. *.120(a)(3)*
- This combined 12 week limit only applies to FMLA leaves for birth, adoption, bonding and care-of-parents. So the employee could use the rest of his/her FMLA leave for the employee's own serious health condition or to care for a child with a serious health condition. *.120(a)(3)*
- A father who is not a husband has some lesser rights. For example, only a husband can take FMLA leave to care for a spouse incapacitated due to pregnancy (e.g., to drive her to a doctor's appointment) *.120(a)(4) and Comments*

Substitution of Paid Leaves

- Employers are now allowed to apply their normal leave polices to the substitution of all types of paid leave for unpaid FMLA leave. *.207(a)*
- The Comments to *.207* provide several useful examples, like:

  (1) Employees have no right to substitute paid sick leave for unpaid FMLA leave to care for a child if the employer's normal sick leave rules allow such leave only for the employee's own illness.

  (2) If the employer's paid sick leave policy prohibits the use of sick leave in less than full day increments, employees would have no right to use less than a full day of paid sick leave regardless of whether it was being substituted for unpaid FMLA leave. The employee would have to take the larger increment if he wants to substitute, and the entire amount of leave taken would count against the employee's leave entitlement.

  (3) If the paid personal leave policy requires two days notice for its use, an employee seeking to substitute paid leave for unpaid FMLA leave would need to provide two days notice.

- The employer may choose to waive these requirements but does not have to. *See Comments to .207*

"Substitution" Rules Where the Leave Is Not Unpaid

- Paid disability leave due to an FMLA-qualifying serious health condition may be designated as FMLA leave and counted against the employee's FMLA leave entitlement. *.207(d).*
- The same is true for workers compensation leave. *.207(e).*
- These are not "substitutions" and neither party can require substitution because these leaves are not unpaid. *See Comments to .207*
  - Any supplemental disability payments are the result of a voluntary agreement between the employer and employee, if permitted by state law and the plan itself. *.207(d)*
  - In the case of workers compensation, many states limit workers comp benefits to 2/3rds of salary. Employers and employees can voluntarily agree to supplement with accrued paid leave, where state law permits. *.207(e) and Comments*

Intermittent Leave: Scheduling

- If an employee needs intermittent or reduced schedule leave for a planned medical treatment, then the employee must make "a reasonable effort" to schedule the treatment so as not to disrupt unduly the employers operations. *.203*
- This is a higher burden on the employee, who previously just had to make an "attempt." *See Comments to .203*
- Especially if the date requested is "just a matter of scheduling convenience for the employee," the employee is required to make that reasonable effort. *See Comments to .203*

Intermittent Leave: Time Increments

- The old standard was that an employer may limit leave increments to the shortest period of time that the employer uses for other leaves, “provided it is one hour or less.”
- Employer efforts to expand this amount were not successful. The language is slightly different but the “count by no more than one hour increments rule” continues in the new regulations.
- This rule applies even if the employer uses larger increments for other types of leaves. *See .205(a)(1) and Comments.*
- In all cases, the employee may not be charged FMLA leave for periods of time that he worked. *.205(a)(1) and Comments*

Intermittent Leave: Time Increments

- There are two exceptions to this "count by no more than one hour increments rule":

  (1) Where physical impossibility prevents the employee from commencing work mid-way thru a shift. In that case, the entire period of absence is designated as FMLA. *.205(a)(2)* The employer is not required to provide alternative work during that period, unless it does so for those on short term sick leave, jury duty, etc. *See Comments to .205*

  (2) An employer may use a shorter amount than one hour when the employee arrives a few minutes late and the employer wants the employee to begin work immediately. *.205(a)(1)* Conversely, an employer is allowed to maintain a policy that leave of any type may only be taken in a one-hour increment during the first hour of a shift (a policy intended to discourage late arrivals). *See Comments to .205*

- Any hours of required overtime that the employee avoids for FMLA reasons may be counted against his FMLA entitlement. *.205(c)*

Light Duty

- Where an employee voluntarily accepts a light duty assignment while recovering from a serious heath condition, that acceptance does not waive the employee's rights, including the right to be restored to his same position. *.220(d)*
- In the case of an open-ended light duty assignment, the employee retains the right to restoration to his old position until the end of the 12 month period that the employer uses to calculate FMLA leave. *.220(d).*
- The recovering employee's time on light duty does not count as FMLA leave. *See Comments to .220*
- Nothing prevents the employer from offering light duty assignments for a finite period of time. *See Comments to .220*

"Perfect Attendance" Bonuses

- Where "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, the employer may deny the payment, unless the payment would otherwise have been made to an employee on an "equivalent leave status" -- such as vacation leave, paid sick time-off or sick leave -- for a reason that does not qualify as FMLA leave. *.215(c)(2) and comments*

"Perfect Attendance" Bonuses

- The comments to *.215* provide some examples of how this works:

  (1) If an employer policy is to disqualify all employees who take leave without pay, it may deny the bonus to an employee who takes unpaid FMLA leave.

  (2) If an employer policy allows an attendance bonus to an employee who takes vacation leave, the employer must pay the bonus to an employee who takes vacation leave for an FMLA purpose (i.e., substitutes paid vacation leave for FMLA leave).

  (3) However, that same employer may deny the bonus to an employee who takes 12 weeks of FMLA, only some of which are covered with substituted paid vacation leave.

Other FMLA Counting Issues

- Bonuses that are not premised on the achievement of a goal, such as a holiday bonus awarded to all employees, may not be denied to employees because they took FMLA leave. *See Comments to .215*
- Where the employee takes FMLA leave of less than a full workweek, the employer cannot count a holiday that the employee does not work that week against his FMLA entitlement unless the employee was otherwise scheduled and expected to work that holiday. *.200(h)*
- Pay raises conditioned upon seniority, length of service or performance need not be granted to employees on FMLA leave unless otherwise granted to employees on an equivalent leave status for a reason that does not qualify as FMLA leave. *.215(c)(1) and Comments*

Waiver of FMLA Claims

- It is okay to settle or release FMLA claims by employees based on past employer conduct without the approval of the DOL or a court. *.220(d)*
- The Comments to *.220* make clear that this applies not only to situations where an FMLA claim has been filed, but also to severance agreements releasing FMLA claims on past employer conduct, whether such claims are known or unknown at the time of signing.

Questions?

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Thank You

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