Family and Medical Leave Act and Military Leave

Summary of Final Regulations

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On November 17, 2008, the DOL issued its long-awaited final regulations under the Family and Medical Leave Act (FMLA), which include expansions to cover military leave. The final FMLA regulations summarized below reflect changes to the current regulations. The military leave provisions are new. The final regulations become effective on January 16, 2009.

The Society for Human Resource Management (SHRM), submitted comprehensive comments to the rules when they were originally proposed and many of those comments are reflected in the final rule. The revised regulations reorganized the rules and clarified many provisions, making them more user-friendly. While not addressing all the weaknesses of the FMLA's current regulations, the new rules will move closer to the goal of ensuring that the law is working for both employees and employers.

Specifically, SHRM advocated for several improvements to the proposed rule and was pleased to see that the final rule includes the following changes:

- clarifies that an employee, in order to substitute paid leave for FMLA leave, must comply with the employer's policy regarding the paid time off even if the requirements are more stringent than FMLA notice requirements;
- establishes that bonuses, awards, or other payments based on the achievement of a specified goal, such as perfect attendance, may be denied if an employee has not met the goal due to FMLA leave;
- allows an entire missed shift to be charged against FMLA leave when it is physically impossible for an employee to begin the shift late, such as working on an airline flight that has already taken off;
- allows an employer to delay or deny FMLA leave when an employee fails to comply with the employer's notice and procedural requirements absent unusual circumstances;
- allows for electronic posting and distribution of FMLA general notice; and
- provides details on the parameters of the military leave provisions including a comprehensive list of what constitutes an "exigency" that qualifies for leave.

The following summary highlights those sections containing the most significant changes and clarifications made during the rule-making process.

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COVERAGE AND ELIGIBILITY ISSUES

Length of Service Requirement (825.110)
In determining whether an employee meets the 12-month service requirement to be eligible for FMLA leave, an employer will only have to review the 7 years prior to the date leave is to begin in most cases. If an employee has a break in service that lasts more than 7 years, the prior service does not need to be counted toward eligibility for FMLA except if the break in service was due to National Guard or Reserve military service, or if there was an agreement when the break in service occurred that the employer would later rehire the employee. Since an employer is not required to retain an employee's personnel records longer than the 3-year FMLA record retention period, the burden is on the employee to prove prior service with the employer if the employer has not retained the documentation.

Becoming Eligible for FMLA While on Non-FMLA Leave (825.110)
If an employer grants a non-FMLA leave to an employee before that employee is eligible for FMLA leave, and if the employee becomes eligible for FMLA leave while on the non-FMLA leave, the leave period after the date the employee becomes eligible is FMLA leave and the leave before such leave is non-FMLA leave.

Joint Employment and Work Site (825.106, 825.111)
For purposes of employee eligibility under the "50 employees within 75 miles rule," an employee's "work site" is the site to which the employee reports to work or, if none, from which the employee's work is assigned. In the case of joint employment, the primary employer's office (to which the employee is assigned or reports) is the employee's work site, except if the employee has physically worked for at least one year at a facility of the secondary employer, in which case that facility is the employee's work site.

CALCULATION OF LEAVE

Holidays (825.200)
An employer may count holidays as FMLA leave if the employee is on FMLA leave the entire week in which the holiday falls. If the employee takes FMLA leave for less than a full workweek in which a holiday falls, the holiday does not count as FMLA leave.

Leave Increments (825.205)
FMLA leave must be tracked using an increment no greater than the shortest period of time that the employer uses to account for use of other forms of leave (as opposed to the shortest increment the employer's payroll system can track), provided that the increment used for FMLA leave is not greater than one hour and as long as the employee's FMLA leave balance is not charged for time while the employee is working or for more than the amount of actual leave taken.

An employer may track use of leave in different increments under different leave policies (e.g., require use of 8-hour increments for vacation, 2-hour increments for sick days). For example, if an employer's policy requires that any type of leave may only be taken in a one-hour increment

during the first hour of a shift to discourage tardiness and an employee is a few minutes late to work due to an FMLA reason, the employer may prohibit the employee from working until the 1-hour increment is reached and charge the employee with one hour of FMLA leave. Alternatively, if an employee needs to leave 30 minutes early due to a qualifying FMLA reason, the employer may only charge the employee with 30 minutes of FMLA leave, even if the employer uses the 1-hour increment rule.

In addition, if an employee is using intermittent or reduced schedule FMLA leave, and if it is physically impossible for the employee to access the worksite after the start of his/her shift, such as working on an airline flight that has already departed, the entire period the employee is forced to be absent from the worksite counts as FMLA leave. The employee must be permitted, however, to resume work when physically possible to do so at the employee's normal work site.

Overtime (825.206)
If an employee would otherwise be required to work overtime but cannot do so because of FMLA leave, the overtime hours the employee would have worked count as FMLA leave. If overtime is voluntary, the overtime declined an employee because of FMLA leave does not count as FMLA leave.

Military Caregiver Leave (825.127)
An employee may take up to 26 weeks of military caregiver leave during a single 12-month period on a per-covered servicemember, per-injury basis (which may be taken continuously, intermittently, or on a reduced schedule basis). The single 12-month period is measured forward from the date an employee's leave to care for the covered servicemember begins, even if the employer uses a different 12-month period for other types of FMLA leave. Once a single 12-month period expires, the employee is eligible for another 26 weeks of military caregiver leave during a subsequent single 12-month period to care for a different covered servicemember or to care for the same covered servicemember if he/she incurs a subsequent serious injury or illness (excluding aggravation or complication of an earlier serious injury or illness for which the employee took military caregiver leave).

If an employee takes military caregiver leave to care for more than one covered servicemember or to care for the same covered servicemember who has incurred a subsequent serious injury or illness, and if the single 12-month periods involved overlap with each other, the employee is limited to taking no more than 26 weeks of leave in each single 12-month period. If an employee does not take all of the 26 weeks of military caregiver leave during the applicable single 12-month period, the balance is forfeited and no carry-over is permitted. In addition, during any single 12-month period, the employee's total leave entitlement is limited to a combined total of 26 weeks for all qualifying reasons under FMLA and military leave.

KEY DEFINITIONS

Definition of "Serious Health Condition" (Continuing Treatment 825.115)
Whether such a condition causes an "incapacity" for FMLA leave is: (a) measured by the duration of the incapacity itself (more than 3 full consecutive days); (b) requires in-person treatment by a health care provider at least once within seven days of the first day of incapacity; and (c) requires either (i) a regimen of continuing treatment initiated by the health care provider

during the first treatment or (ii) a second in-person visit to the health care provider for treatment (the necessity of which is determined by the health care provider) within 30 days of the first day of incapacity.

Definition of "Serious Health Condition" (Chronic Conditions 825.115)
A chronic condition is one that: (a) requires visits for treatment by a health care provider at least twice a year; (b) continues over an extended period of time (including recurring episodes of a condition); and (c) may cause episodic incapacity rather than a continuing period of incapacity.

Definition of "Prenatal Care" (825.120)
The employee husband of a pregnant spouse is entitled to FMLA leave to care for the pregnant spouse who has severe morning sickness or other prenatal complications (and may need physical care) and to accompany her to prenatal doctors' appointments (and may need to be driven or need psychological care). Such leave is not available to a non-spouse father of the child (e.g. boyfriend or fiancé).

Definition of "Needed to Care For" (825.124)
An employee may take leave to care for a family member if needed to provide physical and/or psychological care. The employee does not need to be the only individual or family member available to provide the care nor is the employee required to provide actual care (e.g., someone else is providing in-patient or home care) as long as the employee is providing at least psychological comfort and reassurance.

Definition of "Health Care Provider" (825.125)
Physician assistants who are authorized to practice under state law qualify as health care providers and all medical para-professionals who fall within the definition of "health care provider" (nurse practitioners, nurse-midwives, clinical social workers, and physician assistants) must be performing within the scope of their practice as defined under state law.

Definitions Related to Family Relationships under Military Leave (825.122)
Several new family relationship definitions have been added due to the incorporation of the military family leave provisions. They include "parent of a covered servicemember," "son or daughter of a covered servicemember," "next of kin of a covered servicemember," and "son or daughter on active duty or call to active duty status."

Definition of "Qualifying Exigency" under Military Leave (825.126)
A qualifying exigency is a non-medical activity that is directly related to the covered military member's active duty or call to active duty status. For an activity to qualify as an exigency, it must fall within one of seven categories of activities or be mutually agreed to by the employer and employee. The seven categories of qualifying exigencies are short-notice deployment (leave permitted up to seven days if the military member receives seven or less days' notice of a call to active duty), military events and related activities, certain temporary childcare arrangements and school activities (but not ongoing childcare), financial and legal arrangements, counseling by a non-medical counselor (such as a member of the clergy), rest and recuperation (leave permitted up to five days when the military member is on temporary rest and recuperation leave), and post-deployment military activities.

Definition of "Active Duty or Call to Active Duty Status" (825.126)
For purposes of exigency leave, the term "active duty or a call to active duty status" means duty under a federal call or order to active duty (not a State call to active duty unless by order of the President of the United States) in support of a contingency operation pursuant to specific enumerated provisions of Section 688 of Title 10 of the United States Code. Such active duty or call/order to active duty is only made to members of the National Guard or Reserve components or a retired member of the Regular Armed Forces or Reserve. Therefore, an employee may not take exigency leave if the servicemember is a member of the Regular Armed Forces.

Definition of "Covered Servicemember" (825.800)
For purposes of military caregiver leave, a covered servicemember is a *current* member of the Regular Armed Forces, National Guard, or Reserve, including those on the temporary disability retired list (TDRL), but not including former members or members on the permanent disability retired list. Generally, a former member of the military whose injury or illness manifests itself after the member's discharge from military service (except for those on the TDRL) is not a covered servicemember. The servicemember must be receiving medical treatment or oversight by a Department of Defense or Veterans Affairs health care provider or by a Department of Defense TRICARE network or non-network authorized private health care provider.

SUBSTITUTION OF PAID LEAVE

Use of Paid Time Off Benefits (825.207)
The employee is only entitled to substitute paid leave benefits, such as vacation or sick days, while on FMLA leave if the employee complies with the terms and conditions regarding those benefits as set out in the employer's established and non-discriminatory paid time off benefits policy. The employer must inform the employee of the terms and conditions of the policy. If the employee does not meet those terms and conditions, the employee is still entitled to unpaid FMLA leave, but foregoes the use of paid time off benefits while on leave.

For example:

- If the employer's policy restricts the use of paid time off to a designated period when the facility is shut down, it can deny use of those paid time off benefits to an employee who takes FMLA leave during any other period.
- If the employer's policy requires use of sick days in full-day increments, it does not have to allow an employee with a two-hour FMLA absence to use only two hours of paid time off benefits (instead, the employee could choose to take two hours of unpaid time off and have two hours charged to his/her FMLA entitlement or take a full day of paid FMLA time off and have a full day charged to his/her FMLA entitlement).
- If the employer's policy requires two days' advance notice for the use of paid time off, it does not have to allow an employee to use paid time off for any FMLA absence where two days' advance notice was not given.
- If a collective bargaining agreement requires that employees "bid" for vacation up to a year in advance or restricts vacation during peak periods, the employer is not

required to allow an employee to use paid vacation benefits to cover FMLA absences that occur on an emergency basis or outside the employee's pre-selected vacation period.

Supplemental Pay While on Paid Leave (825.207)
If an employee receives paid time off benefits while on FMLA leave pursuant to a disability benefits plan (e.g., short-term disability, workers' compensation, etc.) and if the amount received is less than 100% of the employee's normal pay, the employer and employee may mutually agree to supplement the disability benefits pay with any other form of paid time off benefits the employee may have (e.g., vacation, sick days, PTO, etc.) if permitted by State law.

Government Employers and Use of CTO While on Leave (825.207)
If a State or local government requires the use of compensatory time off (CTO) for an FMLA-qualifying absence or an employee requests and is permitted to use CTO for an FMLA-qualifying absence, the absence may be counted as FMLA leave and charged to the employee's FMLA leave entitlement.

JOB ASSIGNMENT AND REINSTATEMENT RIGHTS

Transfer to an Alternative Job While on Intermittent or Reduced Schedule Leave (825.204)
A temporary transfer to an alternative job that better accommodates recurring periods of leave is permitted only if the leave is foreseeable based on planned medical treatment for the employee or a family member. An employee on unforeseeable intermittent leave cannot be transferred to an alternative job.

Bonuses and Awards (Including Perfect Attendance Bonuses (825.215))
If a bonus, award, or other payment is based on the achievement of a specified goal (e.g., hours worked, products sold, perfect attendance, safety, etc.) and the employee has not met the goal due to FMLA leave, then the bonus or payment can be denied (and does not need to be pro-rated) as long as other employees on an equivalent leave status (e.g., vacation, sick days, paid time off, etc.) for a reason that does not qualify as FMLA leave are treated the same.

Accepting Light Duty and Its Effect on Reinstatement Rights (825.220)
If an employee accepts a light duty assignment while still eligible for FMLA leave, he/she has reinstatement rights to his/her original or an equivalent job, but only until the end of the 12-month period the employer uses to calculate FMLA leave.

EMPLOYEE NOTICE REQUIREMENTS (825.302 - 825.304)

Timing of Notice
In the case of foreseeable leave, 30 days' advance notice is still required or, if 30 days' advance notice is not possible, notice must be given "as soon as practicable" (meaning the same day or the next business day). If leave is unforeseeable, the employee must give notice of the need "as soon as practicable" (meaning within such reasonable time frame as is established in an employer's usual and customary leave and absence notification policies). Failure to provide timely notice allows the employer to count any absences during the delay as non-FMLA

absences and apply the employer's attendance policy to those absences. In the case of exigency leave (whether foreseeable or unforeseeable), notice must be given "as soon as practicable."

Method of Notice
A request for FMLA leave only needs to be verbal. An employer may, however, require an employee to comply with the employer's usual and customary notice and procedural requirements absent any unusual circumstances and provided that no written notice may be required in emergency situations or for unforeseeable leave. Otherwise, the policy may require written notice (for foreseeable leave) and that leave be requested from a designated individual or by calling a designated phone number. Leave may be delayed for an employee's failure to comply with the employer's policy, and the employer may count any absences during the delay as non-FMLA absences and apply the employer's attendance policy to those absences.

Content of Notice
In requesting leave the first time for a particular FMLA-qualifying condition for which the employer has *not* previously provided FMLA leave to the employee, an employee does not need to mention the FMLA, but must provide sufficient information, depending on the situation, for an employer to reasonably determine whether the FMLA may apply to the leave request (i.e., state a qualifying reason for the leave or explain the reason for the needed leave, provide the anticipated timing and duration of leave if leave is foreseeable, etc.). Calling in "sick" is not enough to trigger the FMLA requirements. In subsequently requesting leave for a particular FMLA-qualifying condition for which the employer has previously provided FMLA leave to the employee, an employee must specifically reference either the qualifying reason for the leave or the need for "FMLA leave."

EMPLOYER NOTICE REQUIREMENTS (825.300)

General Notice (Poster/Policy)
The existing poster and written FMLA policy requirements have been combined into one general notice requirement. DOL has drafted a prototype general notice. It must be posted in conspicuous places that are accessible to both applicants and employees. The employer must also distribute the general notice to employees by including it a handbook (or other written materials) or by providing it to each new hire. Electronic posting and distribution is permissible.

Eligibility Notice
An employer must provide an eligibility notice to any employee who applies for FMLA leave informing the employee of whether he/she is eligible for FMLA leave. DOL has drafted a prototype eligibility notice. If the employee is not eligible, the notice must state at least one reason why the employee is not eligible (including, as applicable, that the employee fails to meet the 12-month service requirement and the number of months the employee has been employed by the employer, that the employee fails to meet the 1,250-hour requirement and the number of hours of service worked for the employer during the appropriate 12-month period, and/or that the employee does not work at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite). The eligibility notice must be provided within five business days after the first time in each of the employer's FMLA leave year that an employee requests FMLA leave for a particular qualifying reason. During that same FMLA leave year, a new notice is required only if the employee's eligibility status changes.

Rights and Responsibilities Notice
An employer must provide a rights and responsibilities notice each time an eligibility notice is required. DOL has drafted a prototype rights and responsibilities notice that is combined on the same form as the eligibility notice. It includes numerous pieces of information, including the employer's designated 12-month FMLA leave year, whether a certification and other documentation will be required, whether the employer will require the use of paid time off benefits while the employee is on leave, and a number of other rights and responsibilities of the employee.

Designation Notice
Once an employer has determined that a leave is FMLA-qualifying, the employer must provide written notice to an employee who has requested FMLA leave either designating the leave as FMLA-qualifying or notifying the employee that the leave does not qualify as FMLA leave. DOL has developed a prototype designation notice. It must be provided within five business days after the employer determines if the leave is FMLA-qualifying (or may be made later as long as the employee suffers no harm, which is the *Ragsdale* rule). If the leave qualifies, it must specify the amount of leave that will be counted as FMLA leave if known, and if not known at that time, a designation notice must be provided upon the employee's request but no more often than every 30 days (if leave was taken during the prior 30 days). If the leave is not FMLA-qualifying, it must so state. It must also state whether a fitness-for-duty certification will be required. The prototype form is a multi-purpose form that can also be used to notify an employee that a second or third opinion is being required or if a health care provider certification submitted by the employee is incomplete or insufficient.

CERTIFICATIONS

Military Exigency Leave (825.309)
An employer may require two different types of certification with respect to military exigency leave. One is a certification that the covered military member is a member of the National Guard or Reserves who is on active duty or called to active duty in support of a contingency operation. A copy of the military member's active duty orders can normally be required and will contain the necessary information. Once an employee furnishes the certification, the employer may not require the same certification again for subsequent absences related to the same active duty of that particular military member. The other certification is a statement from the employee (including available written support documentation) about the nature and details of the specific exigency, the amount of leave needed, and the employee's relationship to the military member. DOL has developed a prototype form for the exigency certification. The employee must provide both certifications within 15 days absent unusual circumstances.

Military Caregiver Leave-General Certification Requirements (825.310)
An employer may require information from the health care provider and from the employee and/or covered servicemember to support military caregiver leave, which enables an employee to care for a covered servicemember with respect to whom the employee is the spouse, son or daughter, parent, or next of kin. DOL has developed a prototype health care provider certification for military caregiver leave. Section I of the certification relates primarily to the servicemember's military status and care to be provided. Section II is a medical certification of

the servicemember's serious injury or illness to be completed by a DOD or VA health care provider or a DOD TRICARE network or non-work authorized private health care provider. The employee must provide both certifications within 15 days absent unusual circumstances.

Military Caregiver Leave-Automatic Emergency Certification (825.310)
DOD may issue a special invitation to any member or members of the servicemember's family when a DOD health care provider has determined that the injury or illness is serious enough to warrant the immediate presence of a family member at the servicemember's bedside. Such an invitation is referred to as an "invitational travel order" (ITO) or "invitational travel authorization" (ITA). If an ITO or ITA is issued to any member of the family (even if the employee's own name is not on it), it constitutes automatic certification of the serious injury or illness and remains in effect for the duration specified on it. In the absence of an ITO or ITA, a medical certification can be required.

Serious Health Condition Certification (825.306, 825.307)
DOL has developed two prototype forms, one for the employee's own serious health condition and one for the serious health condition of a family member. An employee must submit a complete and sufficient medical certification within 15 days (or longer if the employee has made diligent, good faith efforts to obtain it without success). However, in most cases, leave can be denied if it is not submitted at all within 15 days, and an employer has no obligation to notify the employee that it has not been received. If it is timely submitted and is not complete or sufficient, the employer must provide the employee with seven days to cure the deficiencies and a list of what information is still needed. If the employee does not correct it within the cure period, leave can be denied.

Once the employer receives a complete and sufficient certification, the employer may authenticate it (without the employee's consent and by direct contact with the employee's health care provider) and may obtain clarification of any vague or unresponsive information (by direct contact with the provider but only with the employee's consent). In either case, the employee's immediate supervisor is prohibited from having contact with the employee's health care provider. A medical certification is effective as to a particular condition for the stated duration of the leave (if less than one year) or for the remainder of the employer's designated FMLA leave year, whichever is less.

If the employee's health care provider will not complete the certification or provide subsequent clarification of it without a HIPAA authorization from the employee, the employer cannot require the employee to provide the consent. However, the employee will lose FMLA protection if the certification is not timely submitted because of failure to provide the HIPAA consent. If an employee submits a certification from a foreign health care provider and it is not in English, the employer can require the employee to translate it or have it translated.

Recertifications (825.308)
Recertifications can be required every six months in all cases, but only in connection with an absence that has occurred for that medical condition. A recertification can also be required at any time if an extension to a leave is requested, circumstances described in the last certification have changed (such as a pattern of absences around an employee's scheduled days off), or the employer receives information casting doubt on the employee's stated reason for an absence or the continuing validity of the last certification (such as an employee observed engaging in

activities that are inconsistent with a need for time off due to the certified condition). An employer can provide the health care provider with information about the employee's attendance and ask the provider to evaluate whether the employee's attendance pattern is consistent with the need to be absent for the condition in question. Recertification for a particular exigency and second/third opinions are not permitted.

Fitness-for-Duty Certifications (825.312)
An employer may require a fitness-for-duty certification that is more than a simple statement releasing the employee to work. The employer may require the health care provider to actually assess whether the employee has the ability to perform the essential functions of the job. Any such assessment must be based on a list or job description of essential job duties provided by the employer, if notice that such an assessment will be required is included in the designation notice and the list of duties or job description is provided at that time. A fitness-for-duty certification can be required for each continuous leave upon the employee's return to work or, in the case of intermittent or reduced schedule leave, every 30 days if reasonable safety concerns exist (defined as a significant risk of harm to the employee or others). An employee must be given 15 days to provide a fitness-for-duty certification under the "every 30-days" rule, and the employer cannot prohibit the employer from working while awaiting the certification.

WAIVER OF RIGHTS AND OBLIGATION TO COMMUNICATE

Waiver of FMLA Rights (825.220)
Employees may retroactively waive their FMLA rights, but may not waive them prospectively. This means that severance or separation pay provided in exchange for a release of liability may include FMLA claims up to the date the release is signed.

Responsiveness, Cooperation, and Resolution Obligations
In addition to other obligations mentioned elsewhere, *employers* are required to: (a) provide responsive answers to employee questions about employee rights and responsibilities; (b) discuss and resolve with an employee any dispute about whether leave qualifies as FMLA leave; and (c) document any such discussions and resolution and retain such documentation for 3 years pursuant to FMLA record retention rules.

In addition to other obligations mentioned elsewhere, *employees* are required to:
(a) respond to employer questions designed to determine whether an absence is potentially FMLA-qualifying; (b) consult with the employer in advance and make a "reasonable effort" to schedule foreseeable leave for planned medical treatment (whether continuous, intermittent, or reduced schedule) so as not to disrupt unduly the employer's operations; and (c) discuss and resolve with the employer any dispute about whether leave qualifies as FMLA leave.