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New FMLA Regulations Take Effect

Late last year, the Department of Labor issued revised and updated final regulations on the federal Family and Medical Leave Act of 1993, including the new military family leave entitlements. The new regulations take effect on January 16, 2009.

Background

The federal Family and Medical Leave Act (FMLA) requires employers to grant eligible employees unpaid job-protected leave for their own serious illnesses, for the birth or adoption of a child, or to care for seriously ill family members. Early in 2008, President Bush signed into law the first expansion of FMLA since its enactment in 1993, adding two new military family leave entitlements. (See our January 31, 2008 *For Your Information*.)

In November, the DOL issued the first significant revisions to the FMLA regulations in effect for the past thirteen years. The final regulations, which clarify existing rules and implement the statutory expansion of FMLA coverage for military families, are similar to those proposed in February 2008. (See our March 28, 2008 *For Your Information*.)

The Revised Final Regulations

The final regulations clarify certain employer and employee obligations and provide guidance on the new FMLA military leave provisions. Other areas addressed by the regulations include FMLA leave eligibility, the definition of serious health condition, employer and employee notice obligations, and medical and fitness for duty certifications.

Military Family Leave Provisions

The final regulations provide the first actual guidance interpreting the two important new military family leave entitlements – the military caregiver leave and the qualifying exigency leave.

Military Caregiver Leave. Eligible employees are entitled to take up to 26 weeks of job-protected leave in a 12-month period to care for a covered service member with a serious illness or injury incurred in the line of active duty. This leave may be taken intermittently when medically necessary. The regulations clarify that care for covered service members extends to both psychological and physical care. Covered service members include current members of the Regular Armed Forces, National Guard or Reserves and members who are on the

temporary disability retired list. Former members of the Regular Armed Forces, National Guard or Reserves and members who are on the permanent disability retired list are not covered.

Eligibility for military caregiver leave extends beyond the service member's parent, spouse, or child to include next of kin. For purposes of this leave, the definition of son or daughter has been revised to include the service member's "biological, adopted or foster child, stepchild, legal ward or child for whom the service member stood in loco parentis, and who is of any age." The definition of parent has similarly been expanded to include the service member's "biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the service member." However, parents-in-law are not included. Next of kin is defined as the service member's nearest blood relative (other than a spouse, parent, or child) in the following priority order – custodial blood relatives, siblings, grandparents, aunts and uncles, and first cousins. Family members sharing the same relationship (e.g., all siblings) will all be considered next of kin and each will be entitled to leave for caregiving. However, a husband and wife who are FMLA eligible and work for the same employer may be limited to a combined total of 26 weeks' caregiver leave.

> ***BUCK COMMENT.*** *Although next of kin are eligible for military caregiver leave, they remain ineligible for other types of FMLA leave unless they independently satisfy applicable eligibility criteria (e.g., immediate family member).*

Importantly, the regulations clarify that military caregiver leave is not in addition to the 12 weeks of FMLA leave normally available to eligible employees, but is aggregated with all other types of FMLA qualifying leave during the applicable 12-month period. Although an eligible employee's entitlement is capped at a combined total of up to 26 weeks for all FMLA leave taken during the period, the employee may not take more than 12 weeks of leave for reasons other than military caregiving. The 12-month period begins on the day the employee begins caregiver leave and ends 12 months thereafter, regardless of how the employer normally tracks the 12-month period for purposes of determining FMLA leave entitlement (e.g., calendar year, rolling 12 months). Otherwise available caregiver leave not used during that period is forfeited.

Because the military caregiver leave is available on a per service member per injury basis, an eligible employee may be entitled to take more than one such leave during the course of his or her employment to care for different service members or for the same service member with a subsequent injury or illness. In such circumstances, leave is still limited to no more than 26 weeks during the applicable period.

> ***BUCK COMMENT.*** *Because the single 12-month period applicable to military caregiver leave will often not shadow the employer's normal leave year, employers may experience increasingly complex administrative issues.*

Qualifying Exigency Leave. Eligible family members will be entitled to take up to 12 weeks of FMLA leave for "qualifying exigencies" arising out of a covered military member's active duty status, or call to active duty, in support of a contingency operation. This leave may be taken intermittently. Importantly, this leave is not

available to family members of military members who are in the Regular Armed Forces, are retired members of a state Reserve or National Guard unit, or are called to active duty by a state rather than the federal government – it is available only to the family members of National Guard or Reservists called to federal active duty.

The regulations specify the following eight events as qualifying exigencies –

- short-notice deployment (i.e., called to active duty seven or fewer days prior to the date of deployment)
- military events, ceremonies, or programs related to active duty or related activities
- childcare and school activities
- financial or legal appointments
- counseling
- rest and recuperation
- post-deployment activities (e.g., arrival ceremonies and reintegration briefings)
- additional activities agreed upon by the employer and employee.

In contrast to the military caregiver leave, the employer's standard FMLA leave year applies to qualifying exigency leave. The regulations include a separate certification form (linked below) that employers may use in connection with this leave. As part of the certification process, the employer may request copies of the military member's orders or other military documentation, facts regarding the exigency, and dates of the military member's active duty service and beginning of the exigency.

Employee Eligibility

The regulations do not alter the basic FMLA eligibility requirements. Employees must have been employed by the employer for at least 12 months, have at least 1,250 hours of service during the 12-month period immediately preceding the leave, and work at a location where at least 50 employees are employed by the employer within 75 miles. Time spent on vacation or sick leave may be applied towards the 12-month requirement, provided the employee is maintained on the payroll and is receiving other benefits from the employer (e.g., workers' compensation, group health plan benefits).

While the 12 months of employment need not be consecutive, the final regulations clarify that employers do not generally have to count employment periods prior to a break in service of seven years or more. Regardless of the length of the service break, prior service does count towards the 12-month requirement if the employee was fulfilling his or her National Guard or Reserve military service obligations or the employee was on an approved absence or unpaid leave (e.g., for education or childrearing) in accordance with a written agreement or collective bargaining agreement affirming the employer's intent to rehire the employee. Time spent in military service is

credited toward both the hours worked and service requirements. For this purpose, the employee's pre-service work schedule can generally be used to determine the hours that would have been worked but for the period of military service.

The regulations clarify that an employee who begins leave before becoming FMLA eligible may become eligible during his or her absence, in which case the portion of leave taken for a qualifying reason after the eligibility requirement is met would be FMLA protected, and chargeable against the employee's entitlement.

Once a determination has been made that an employee is eligible for leave, all FMLA absences for the same qualifying reason are considered a single leave and the determination of eligibility cannot change during the leave year.

> ***BUCK COMMENT.*** *In the event that an employee applies for leave after previously taking leave for the same reason in a single leave year, the employer cannot declare the employee ineligible because he or she failed to work 1,250 hours in the immediately preceding 12 months. Once the eligibility determination is made for the initial leave, the determination is effectively "frozen" for that leave year.*

Serious Health Condition

Despite employer requests, the DOL did not substantively redefine serious health condition or clarify what constitutes a chronic serious health condition. The regulations still require an illness or injury involving either inpatient care or continuing treatment by a health care provider. To satisfy the continuing treatment requirement, an employee who is incapacitated for more than three consecutive days must do one of the following –

- visit a health care provider twice within 30 days of the first day of incapacity (unless extenuating circumstances prevent a follow-up visit), with the first visit within seven days of the first day of incapacity
- see a health care provider within seven days of the first day of incapacity, which results in a regimen of continuing treatment under the provider's supervision (e.g., prescription medication, physical therapy).

In the case of a chronic condition, the employee must visit a health care provider at least twice a year.

> ***BUCK COMMENT.*** *Because the regulations now allow an employee 30 days to receive follow-up care from a health care provider, employers may face more initial uncertainty as to whether absences are, in fact, covered under FMLA.*

Notice Requirements

The final regulations clarify and expand certain employer and employee notice obligations, with the introduction of seven new or revised model forms –

- Notice to Employee of Rights under FMLA (revised poster - WHD Publication 1420)

- Notice of Eligibility and Rights & Responsibilities (WH-381)
- Designation Notice (WH-382)
- Certification of Health Care Provider for Employee's Serious Health Condition (WH-380-E)
- Certification of Health Care Provider for Family Member's Serious Health Condition (WH-380-F)
- Certification of Qualifying Exigency for Military Family Leave (WH-384)
- Certification for Serious Injury or Illness of Covered Servicemember for Military Family Leave (WH-385).

Covered employers must post the general notice even if no employees are eligible for FMLA leave, and may post it electronically in appropriate circumstances. If a covered employer has any eligible employees, it must also distribute this notice to each employee (in hard copy or electronically) in any employee handbook or leave policy it maintains or by distributing a copy to each new employee upon hire. If a significant number of workers are not English speaking, the employer must provide the general FMLA notice in a language in which the employees are literate.

Employers must generally notify employees in writing or verbally of their eligibility for FMLA leave within five business days after a leave request or after learning that leave may be for a qualifying reason. The notice must explain any reasons for ineligibility. Employers must also provide a written notice to each employee taking FMLA leave of the employee's obligations and the consequences of failing to satisfy them. For this purpose, the regulations include the new prototype eligibility form linked above. Generally, the employer must request any required certifications at the time the eligibility notice is given or within five business days after leave begins. Employees must be given at least 15 calendar days to provide any required medical certifications, and at least seven calendar days to cure any deficiencies once identified by the employer in writing. The regulations include two versions of a new prototype medical certification form (one for the employee's own serious health condition and another for that of a family member), as well as the new prototype certification forms for the military leave entitlements, all linked above.

Generally, the employer must notify the employee as to whether the leave is designated as FMLA leave within five business days (rather than two as currently) after receiving a completed certification or sufficient information to determine whether the leave requested or taken is for a qualifying reason. The employee must also be notified of the amount of leave that will be counted against his or her FMLA entitlement, whether paid leave must be substituted for FMLA leave, and any requirement to provide a fitness for duty certification before returning to work. For this purpose, the regulations include the new prototype designation notice linked above.

In a significant shift, the final regulations allow certain employer representatives (e.g., human resources professionals, leave administrators) to contact an employee's health care provider to clarify and authenticate a medical certification for FMLA leave. For medical conditions that last beyond a single leave year, the employer

may require a new medical certification for each new leave year. The regulations provide that employers may not request recertification more often than every 30 days, except in specified circumstances. If the medical certification indicates a minimum duration of more than 30 days, recertification may not generally be requested until that time has passed. In all cases, employers may request recertification at least every six months in connection with an absence.

Under certain circumstances, employers will be allowed to require fitness-for-duty certifications that specifically address the employee's ability to perform the essential functions of the job. To do so, the employer must give the employee a list of those functions no later than when it provides the FMLA designation notice discussed above. If reasonable safety concerns exist, an employer may also request a fitness-for-duty certification every 30 days if the employee has taken intermittent or reduced schedule leave during that period.

Reporting Absences – Employee Obligations

The final regulations increase the burden on employees to notify employers of their need for FMLA leave. Employees must still provide at least 30 days' advance notice of foreseeable leave. In the event the employee learns of the need for FMLA leave less than 30 days in advance, the employee must notify the employer as soon as practicable, generally on the same day or next business day. Under the new regulations, employers may request an explanation as to why the employee did not give the full 30 days' advance notice. Where the need for leave is not foreseeable, employees must generally follow the employer's customary procedures for requesting leave. If the employee fails to do so, the employer may delay or deny FMLA coverage, with certain exceptions.

Intermittent Leave

The final regulations clarify that employees who take intermittent leave for medically necessary treatment must make a "reasonable effort" to schedule treatment so that it will not unnecessarily disrupt the employer's operations. They also clarify the rule governing the time increments employers may use to account for intermittent or reduced schedule leave. Specifically, an employer may use shorter – but not longer – time increments for FMLA leave than it uses for other forms of leave.

Light Duty

The final regulations clarify that time spent working light duty assignments while recovering from a serious health condition may not be counted against an eligible employee's FMLA entitlement or related reinstatement rights. However, they modify existing regulations to provide that an employee who accepts light duty in lieu of taking FMLA leave will lose his or her right to restoration to his or her original or an equivalent position if he or she remains in a light duty job at the end of the employer's normal 12-month leave year.

Substitution of Paid Leave for Unpaid Leave

The final regulations provide that the employee must follow the terms and conditions of the employer's paid leave policy when substituting accrued paid leave (e.g., vacation days) for unpaid FMLA leave. Unlike prior regulations, the new regulations do not distinguish between various forms of accrued paid leave for these purposes and do not have special rules regarding the substitution of paid sick leave.

Settlement of FMLA Claims and Penalties for Noncompliance

The final regulations codify the DOL position that employers may obtain a release of current or former employees' past – but not prospective – FMLA claims without approval of the DOL or the courts. Further, the regulations codify the U.S. Supreme Court's decision in *Ragsdale v. Wolverine Worldwide, Inc.* and clarify that an employer can be liable for failing to provide required FMLA notices only if the employer's failure causes actual harm to the employee (e.g., lost compensation or benefits).

Effective Date

The regulations take effect on January 16, 2009.

Conclusion

The new regulations significantly impact employment policies and leave management. Because similar state leave laws have not yet changed, the interplay between the new FMLA regulations and state laws will be complex. Employers should review their existing leave policies and practices, certification forms, and employee handbooks to ensure compliance with the new regulatory requirements. Buck's consultants would be pleased to assist you in updating your leave policies, forms and related employee communications.