

Client Alert



A report for clients and
friends of the Firm

November 2008

New FMLA Regulations Take Effect January 2009: Are You Ready?

On November 17, 2008, the United States Department of Labor (“DOL”) published its long-awaited revised and updated final rules interpreting the Family and Medical Leave Act (“FMLA”). These new regulations go into effect on January 16, 2009, unless Congress votes to disapprove the regulations. The new regulations provide needed clarity for workers and employers about their respective responsibilities, rights, and obligations under the FMLA and reflect the DOL’s and the “stakeholders’” 15 years of experience with the statute and existing regulations.

Among other things, these new rules help implement the military family leave provisions enacted in the National Defense Authorization Act for fiscal year 2008, respond to caselaw – particularly a U.S. Supreme Court decision – invalidating certain provisions in the DOL’s regulations, and reflect the DOL’s review of and response to over 4,600 public comments pertaining to its 2008 Notice of Proposed Rulemaking and some 15,000 public comments submitted in reply to DOL’s 2006 Request for Information. In this regard, Proskauer Rose LLP prepared comments on behalf of the U.S. Chamber of Commerce, as well as for certain of our clients, and the Preamble to the final regulations makes reference to those submissions 55 different times.

While we continue to review this lengthy and significant regulatory enactment, this Client Alert discusses many of the more significant changes set forth in the regulations.

Overview

As discussed more fully herein, here are key highlights:

- Professional Employer Organizations (“PEOs”) that contract with employers are not joint employers with their clients *unless* the PEO: (1) has the right to hire, fire, assign, or direct and control the client’s employees, or (2) benefits from the work that the employees perform.
- The final rule clarifies the requirements satisfying a serious health condition.
- Employees who take intermittent FMLA leave for planned medical treatment have a statutory obligation to make a “reasonable effort” to schedule such leave so as not to disrupt unduly the employer’s operations.
- If an employee voluntarily performs “light duty” work, time spent doing such work will *not* count against an employee’s FMLA leave entitlement, and the employee’s right to job restoration is held in abeyance during the light duty period.
- Employers may deny “perfect attendance” awards to employees who do not have perfect attendance because they took FMLA leave, *provided* the employer treats employees taking non-FMLA leave in the same way.
- Employers (e.g., Human Resources) may contact an employee’s healthcare provider directly, but only for clarification and authentication of a medical certification. The employer may *not* request additional information beyond that included in the certification form.
- FMLA protection is expanded to include family members caring for a “covered service member” with a serious injury or illness incurred in the “line of duty on active duty.” These family members are able to take up to 26 workweeks of leave in a 12-month period.
- Family members of personnel on active duty may also take FMLA leave for “qualifying exigencies,” defined as: (1) short-notice deployment (2) military

events and related activities (3) childcare and school activities (4) financial and legal arrangements (5) counseling (6) rest and recuperation (7) post-deployment activities and (8) additional activities where the employer and employee agree to the leave.

- Exigent Circumstances Leave is *not* available to family members of individuals in the Regular Armed Forces, but rather extends only to those covered military members called or ordered to active duty as part of a contingency operation – retired members of the Regular Armed Forces, members of the Reserves, including the retired reserves, and/or members of the National Guard.
- Employers must account for FMLA leave using an increment no greater than the shortest period of time used to account for other forms of leave, provided that it is not greater than one hour.
- The terms and conditions of an employer's paid leave policies apply and must be followed by the employee in order to substitute any form of accrued paid leave for unpaid FMLA leave.
- Employers are required to provide employees with a general notice of FMLA rights, an eligibility notice, a rights and responsibilities notice, and a designation notice. The healthcare certification form has been updated and revamped. The DOL has provided several new sample forms that employers can use for these different purposes, including forms covering exigent circumstances and covered servicemember family leave.
- If an employer has no handbook or other written materials, it must provide general FMLA notice to new employees upon being hired. An employer has 5 business days to respond to an employee's request for leave. If an employee suffers individual harm because the employer fails to follow the notification rules, the employer may be liable.
- Where the amount of leave to be taken is not known at the time of FMLA designation, an employer may inform the employee of the number of hours counted against his or her FMLA leave entitlement only upon employee request, and no more often than every 30 days.
- The final rules highlight the consequences if an employee does not provide proper notice or fails to satisfy his/her certification requirements.

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Coverage Under the Family and Medical Leave Act

Joint Employer Coverage (§ 825.106)

- This section of the current regulations governs employer coverage and employee eligibility in the case of joint employment and sets forth the responsibilities of the primary and secondary employers. The DOL final rule provides that PEOs that contract with client employers only to perform administrative functions – including payroll, benefits, regulatory paperwork, and updating employment policies – are *not* joint employers with their clients. This was the very position that Proskauer pressed in its Comments submitted on behalf of PEO clients. However, depending on the facts and circumstances, including the economic realities of the parties' relationship, a PEO may be considered a joint employer if the PEO: (1) has the right to hire, fire, assign, or direct and control the client's employees, or (2) benefits from the work that the employees perform. In a joint employment relationship with a PEO, the client employer most likely would be deemed the primary employer.

Definition of "Eligible" Employee (§ 825.110)

- This section sets forth the eligibility standards employees must satisfy in order to take FMLA leave, including the requirement that the employee must have been employed by the employer for at least 12 months, have at least 1,250 hours of service in the 12-month period preceding the leave, and that the 12 months need not be consecutive. The DOL has now clarified when gaps in service in prior employment will count toward an employee's 12-month requirement. The final regulation makes clear that, although the 12 months of employment need not be consecutive, employment prior to a continuous break in service of seven (7) years or more need not be counted.¹
- However, the final rule also provides two new exceptions to the general rule discussed above: (1) a break in service resulting from the employee's fulfillment of military obligations; and (2) a period of approved absence or unpaid leave, such as for education or child rearing purposes, where a written agreement or collective bargaining agreement exists concerning the employer's intent to rehire the employee. In these situations, employment prior to the break in service must be used in determining whether the employee has been employed for at least 12 months, regardless of the length of the break in service.

¹ The DOL has not changed the three-year record keeping requirements under the FMLA. Therefore, as in the past employers must retain documentation to confirm previous employment for a former employee who at the time of rehiring had a break in service of three years or less. Where an employee relies on a period of employment that predates the employer's records, it will be incumbent upon the employee to demonstrate some proof of the prior employment.

- The DOL clarifies existing language to the effect that employee eligibility determinations must be made as of the date leave commences. This language had led to confusion regarding eligibility when employees who fulfilled the 1,250 hours worked requirement, but not the 12 months of employment requirement, began a block of leave. The final rule clarifies that when an employee is on leave at the time s/he meets the 12-month eligibility requirement, the period of leave prior to meeting the statutory requirement is non-FMLA leave and the period of leave after the statutory requirement is met is FMLA leave.

Determining Whether 50 Employees are Employed Within 75 Miles (§825.111)

- In determining an employee's eligibility when s/he is jointly employed by two or more employers, the final regulations provide that the worksite of a jointly employed employee is the office of the primary employer from which the employee reports or is assigned. However, the DOL also explains that if the employee has physically worked for at least a period of one year at the secondary employer's facility, such employee's worksite would then be that location.

Serious Health Condition (§§ 825.113, 825.115)

- The DOL essentially retained the current definition of "serious health condition," with certain modifications. Notably, the DOL did not modify the types of treatments and conditions ordinarily excluded by the definition (colds, flu, etc.). The DOL also announced that it would adhere to its current objective test that, ordinarily, such health conditions as a cold or flu would not satisfy the definition of "serious health condition" in § 825.114(a)(2) unless they met the regulatory criteria for a serious health condition, i.e., an incapacity of more than three consecutive calendar days that also involves qualifying treatment.
- Section 825.115 defines continuing treatment for purposes of establishing a serious health condition. The final rule establishes that an employee can meet this definition if, in connection with a period of incapacity of more than three consecutive full calendar days, the employee or family member has: (i) two visits to a health care provider, which must occur within 30 days of the beginning of the period of incapacity *unless* extenuating circumstances exist preventing a follow-up visit from occurring as planned by the health care provider; or (ii) one visit to a health care provider *and* a regimen of continuing treatment, such as a prescription. In both cases, the first (or only) in-person treatment must occur within seven (7) days of the first day of incapacity. The health care provider, not the employee

or patient, decides if a second visit during the 30 day period is required.

- The regulations currently provide that a chronic serious health condition "[r]equires periodic visits for treatment," yet do not define "periodic." The DOL now defines the term "periodic" such that in order to qualify as a chronic serious health condition, the employee must visit his/her healthcare provider at least twice per year.

Leave for Pregnancy, Birth, Adoption or Foster Care (§§ 825.120, 825.121)

- The current regulations and final rule set forth that leave after the birth of a healthy child or leave for adoption or foster care must be concluded within 12 months from the child's birth or date of the placement. Leave for adoption or foster care may commence before the actual birth or adoption if an absence from work is necessary for the placement for adoption or foster care to proceed. Additionally, the final regulation provides that spouses who work for the same employer are limited to a total of 12 weeks combined for FMLA leave for the birth or placement for adoption or foster care of a healthy child. The final rule also explains that the husband is eligible for FMLA leave if he is needed to care for his pregnant spouse who is incapacitated as a result of her pregnancy. Notably, such leave is not available to a boyfriend or fiancé who is the unborn child's father. Further, both spouses are each entitled to their full 12 weeks of FMLA leave to care for a child with a serious health condition, even if they both work for the same employer.

Definition of Spouse, Parent, Son or Daughter, Adoption and Foster Care (§ 825.122)

- The current regulations provide definitions of spouse, parent, and son or daughter for purposes of determining whether an employee qualifies for FMLA leave and provide FMLA leave where a child 18 years or older is incapable of self-care because of a disability. The DOL specifies that the determination of whether an adult child has a disability should be made *at the time leave is to commence*.

Needed To Care For a Family Member (§ 825.124)

- The employee seeking protected leave need *not* be the *only* individual or family member available to care for the qualified family member.

Definition of Health Care Provider (§ 825.125)

- The final regulations provide that physician assistants ("PAs") be added to the list of recognized health care

providers and deletes the existing requirement that PAs operate “without supervision by a doctor or other health care provider.”

Counting Holidays For FMLA Purposes (§ 825.200)

- In determining whether holidays are included in the FMLA computation in cases where an employee takes leave in increments of less than one full week, the regulations differentiate between full weeks of FMLA leave and partial weeks of FMLA leave. If an employee needs *less than a full week* of FMLA leave, and a holiday on which the employee would not otherwise have been required to work falls within the partial week of leave, the hours that the employee does not work on the holiday *cannot* be counted against the employee’s FMLA leave entitlement. On the other hand, if an employee needs a full week of leave in a week with a holiday, the hours the employee does not work on the holiday will count against the employee’s FMLA entitlement.

Intermittent Leave or Reduced Leave Schedule (§ 825.203)

- The new regulation clarifies that an employee who takes intermittent leave for a planned medical treatment has an obligation to make a “reasonable effort” (as opposed to an “attempt”) to schedule the treatment so as not to disrupt unduly the employer’s operations. The DOL notes in the Preamble that “employees must try to arrange treatment on a schedule that accommodates the employer’s needs,” but recognizes that this may not always be possible.

Increments of FMLA Leave for Intermittent and Reduced Schedule Leave (§ 825.205)

- The final regulations make clear that an employer must account for FMLA leave using an increment no greater than the shortest period of time that the employer uses to account for use of other forms of leave, provided that it is not greater than one hour. In addition, an employee’s FMLA entitlement may not be reduced by more than the amount of leave actually taken. Employers are not required to account for FMLA leave in increments of 6 minutes or even 15 minutes simply because their payroll systems are capable of doing so.

Substitution of Paid Leave (§ 825.207)

- Under the final rule, all forms of paid leave offered by the employer are treated the same, notwithstanding whether the leave substituted is vacation, sick leave, family leave, or personal leave under the employer’s policy.

- The final regulations clarify that the terms and conditions of an employer’s paid leave policies apply and must be followed by the employee in order to substitute any form of accrued paid leave – including, for example, paid vacation, personal leave, family leave, paid time off, or sick leave – for unpaid FMLA leave. Thus, where an employer’s paid leave policy requires the use of such leave in an increment of time larger than the amount of FMLA leave requested by the employee, if the employee wishes to substitute paid leave for unpaid FMLA leave, the employee must take the larger increment of leave required under the employer’s paid leave policy. In such circumstances, the entire amount of leave taken will count against the employee’s FMLA entitlement.
- The DOL also has instituted certain safeguards for employees. When providing notice of eligibility for FMLA leave to an employee, an employer must make the employee aware of any additional requirements for the use of paid leave and must inform the employee that s/he remains entitled to unpaid FMLA leave even if s/he decides not to follow the employer’s paid leave policies (e.g., the employee may still take less than full day intermittent leave even if the employer’s paid leave policies only offer full day leave or paid time off).
- The DOL clarifies what is meant in § 825.207 by the term “substitution.” For FMLA purposes, “substitution” means that the unpaid FMLA leave and the paid leave provided by an employer run concurrently. This is standard practice under the current regulations and is not a change in DOL enforcement policy.
- The final regulations delete language (formerly § 825.207(h)) providing that when an employer’s procedural requirements for taking paid leave are less stringent than the requirements of the FMLA, employees cannot be required to comply with higher FMLA standards. This regulation was deleted because it conflicted with statutory provisions requiring employees to provide 30 days’ notice for foreseeable leave and requiring certification of the need for any FMLA leave for a serious health condition.
- The DOL clarified the interaction between paid disability benefits and unpaid FMLA leave. Thus, the substitution of paid leave does not apply where the employee is receiving paid disability leave. While neither the employer nor employee may require the substitution of paid leave in such circumstances, they may voluntarily agree, where state law permits, to supplement the disability plan benefits with paid leave, such as in the circumstance where a plan only provides replacement income for two-thirds of an employee’s salary.
- The new rules allow the use of compensatory time accrued by public agency employees under the Fair Labor

Standards Act (“FLSA”) to run concurrently with unpaid FMLA leave when leave is taken for an FMLA-qualifying reason.

Employee Failure To Make Health Premium Payments (§ 825.212)

- The final regulation adds language making clear that if an employer allows an employee’s health insurance to lapse due to the employee’s failure to pay his/her share of the premium while on FMLA leave, the employer has a duty to reinstate the employee’s health insurance when the employee returns to work. If the employer fails to reinstate the insurance, it can be liable for harm suffered by the employee as a result.

Equivalent Position and Terms/Conditions of Employment (§ 825.215)

- An employer may disqualify an employee from a bonus or other payment based on the achievement of a specified goal, such as hours worked, products sold or perfect attendance, where the employee has not met the goal on account of FMLA leave, *unless* the bonus or payment is otherwise paid to employees on an equivalent leave status for a reason that does *not* qualify as FMLA leave. For example, if an employer’s policy is to disqualify all employees who take leave without pay from a perfect attendance bonus, the employer may deny that bonus to an employee who takes unpaid FMLA leave. Note, though, that bonuses or other awards 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.

Protection For Employees Who Request Leave or Otherwise Assert FMLA Rights (§ 825.220)

- **Interference:** The DOL clarifies that the prohibition on interfering with an employee’s rights under the FMLA includes both a prohibition on discrimination and retaliation, and specifically sets forth the remedies for interfering with those rights. Thus, employers may be liable for compensation and benefits lost by reason of the violation, including actual monetary losses sustained as a direct result of the violation and for other appropriate equitable relief (e.g., reinstatement, promotion, etc.).
- **Waivers:** With respect to waivers of rights and settlements of FMLA claims, the DOL states that an employer need *not* first obtain the permission or approval of the DOL or a court in order to get a valid voluntary settlement and release of past FMLA claims. This regulation carries forward the DOL’s understanding of its existing regulations, and rejects the Fourth Circuit’s

decision in *Taylor v. Progress Energy*, 493 F.3d 454 (4th Cir. 2007), *cert. denied*, 2008 WL 2404107 (June 16, 2008), which held that employees cannot voluntarily settle their past FMLA claims. Under the proposed regulation, only the waiver of prospective FMLA rights is prohibited.

- An employee’s voluntary acceptance of a light duty assignment while recovering from a serious health condition does not constitute a waiver of the employee’s prospective FMLA rights, including the right to be restored to his or her former position (or an equivalent position) at the end of the FMLA period.

Employee and Employer Rights and Obligations Under the Act

Employer Notice Requirements (§ 825.300)

- To streamline its current notice requirements that an employer post an FMLA notice, even if no employees are eligible for FMLA leave, and place a notice of FMLA rights and responsibilities and the employer’s policies on the FMLA, in an employee handbook (if one exists), the DOL provides that one document containing identical information be both posted *and* distributed, thereby satisfying both the posting and distribution requirement. Electronic posting of the general notice is permissible so long as all employees and applicants for employment have access to the information. Thus, if some segment of employees do not have ready access to computers, paper copies must be posted in locations accessible to employees and applicants alike.
- The DOL makes clear that if an FMLA-covered employer has any eligible employees, it must provide notice in an employee handbook or other written guidance provided to employees about benefits or leave rights. If an employer does not have such written materials, an employer can provide the general notice to new employees upon hire. Such distribution can be done electronically. To assist employers with their notice obligations, the DOL has provided a new form – Notice to Employees of Rights Under FMLA – which places employees on notice of their rights and obligations and is found at Appendix C to the regulations.

Eligibility Notice

- The final rule requires that the eligibility notice be conveyed within five (5) business days (previously two (2) business days) after the employee either requests leave, or the employer acquires knowledge that the employee’s leave may be for an FMLA-qualifying reason, absent extenuating circumstances. A new form – Notice of

Eligibility and Rights and Responsibilities – is suggested by the DOL and attached as Appendix D to the regulations.

- If an employee is ineligible for FMLA leave, the final rule requires that the employer's eligibility notice to the employee provide at least one reason why the employee is not eligible.
- If an employee provides notice of a subsequent need for FMLA leave during the 12-month period for a different FMLA-qualifying reason, the employee's eligibility status has not changed and the employer need not provide additional eligibility notice. However, if an employee's eligibility has changed, s/he must be notified of the change in his or her eligibility status within five (5) business days of the request for leave, absent extenuating circumstances.
- Employers should include a statement of the employee's essential job functions with the designation notice if they will require that those functions be addressed in a fitness-for-duty certification. The DOL has included a suggested Designation Notice as Appendix E to its regulations.

Rights and Responsibilities Notice

- An employee should be provided with a notice of rights and responsibilities at the same time the eligibility notice is provided. See the DOL suggested forms attached as Appendices C and D to the final regulations.
- This notice should include, among other things, an explanation that the leave may be designated and counted against the employee's FMLA leave entitlement if qualifying; any requirements to provide medical certification; the employee's right to substitute employer provided paid leave; the employee's rights to maintain benefits and how to pay premiums to continue benefits; and job restoration upon return from FMLA leave. Any required certification forms may accompany this notice and the notice may be distributed electronically.

Designation Notice

- The final rule requires an employer to notify the employee within five (5) business days (previously two (2) business days), absent extenuating circumstances, that leave is designated as FMLA leave once the employer has sufficient information to make such a determination. See the new form – Designation Notice – attached as Appendix E to the final regulations.
- An employer will also be required to notify the employee if the leave is not designated as FMLA leave due to

insufficient information or a non-qualifying reason. The current regulations do not specifically address designation of unforeseen, intermittent leave.

- If the employer requires paid leave to be substituted for unpaid leave, the employer must notify the employee in the designation notice.
- If employees must present a fitness-for-duty certification prior to being restored to employment, the employer must provide notice of any such requirement with the designation notice along with a list of the essential functions of the employee's position.
- The final rule concerning the designation notice also contains an additional provision that would expressly require the employer to inform the employee, if possible, of the number of hours, days or weeks that will be designated as FMLA leave. However, to the extent that future leave will be needed by the employee for a condition, but the exact amount of leave is unknown (as is often the case with unforeseeable intermittent leave for a chronic serious health condition), the employee must be informed of the number of hours counted against the FMLA leave entitlement only upon the employee's request and no more often than every 30 days so long as FMLA leave was taken during that 30-day period.
- This final rule also permits an employer to provide an employee with both the eligibility and designation notice at the same time in cases where the employer has adequate information to designate leave as FMLA leave when an employee requests the leave.

Consequences of Failing to Provide Notice

- In *Ragsdale v. Wolverine World Wide, Inc.*, the U.S. Supreme Court suggested that if an employer fails to notify an employee of his or her FMLA rights, the employee may have a remedy *if* the employee can show that the employer interfered with, restrained or denied the employee the exercise of his or her FMLA rights *and* that the employee suffered damages as a result. See, *Ragsdale*, 535 U.S. 81, 89 (2002). In response, the final rule provides that the employer's failure to comply timely with the notice designation requirements could result in interference with, restraint of, or denial of the use of FMLA leave. Thus, if the employee can show individualized harm as a result of the employer's failure to provide notice of eligibility or designation of FMLA leave as required, the employee is entitled to the remedies provided by the statute (e.g., lost compensation and benefits, etc.).

Employer Designation of FMLA Leave (§ 825.301)

- In light of *Ragsdale*, the DOL's final rule acknowledges that if an employer fails to provide timely notice, employers may retroactively designate FMLA leave *absent* a showing of individual harm to the employee, but that if an employer fails to designate leave timely and if an employee establishes that he or she has suffered harm as a result of the employer's actions, the retroactive designation may be voided and a remedy may be available.
- The remedies an employer may be liable for include compensation and benefits lost by reason of the violation, other monetary losses sustained as a direct result of the violation, and appropriate equitable relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered.

Employee Notice Requirements For Foreseeable FMLA Leave (§ 825.302)

- This rule provides that when an employee gives less than 30 days advance notice of the need for foreseeable FMLA leave, the employee must respond to a request from the employer and explain why it was not practicable to give 30 days notice.
- An employee must give at least 30 days' notice if his/her request for FMLA leave is foreseeable, and if such notice is not possible, the employee must give notice "as soon as practicable." Under the final rule, the DOL revised the definition of "as soon as practicable," to be "as soon as both possible and practicable, taking into account all the facts and circumstances of the individual case." In its commentary, the DOL explained that, absent emergency situations, where an employee becomes aware of a need for FMLA leave less than 30 days in advance, the DOL expects that it will be practicable for the employee to provide notice of the need for leave either the same day (if the employee becomes aware of the need for leave during work hours) or the next business day (if the employee becomes aware of the need for leave after work hours).
- With respect to the content of employee notice, the DOL retains the standard that an employee need not assert his/her rights under the FMLA or even mention the FMLA to put the employer on notice of the need for FMLA leave, *so long* as employees provide sufficient information to make an employer aware that FMLA rights may be at issue. The DOL clarified that "sufficient information" may include, depending on the situation, information such as the employee is unable to perform the functions of the job (or that a covered family member is unable to participate in regular daily activities), the

employee is pregnant, or has been hospitalized overnight, the anticipated duration of the absence, and whether the employee (or family member) intends to visit a health care provider or is receiving continuing treatment.

- The final rule sets forth a different notice standard when an employee requests leave for previously-certified FMLA-qualifying reason. In such cases, the employee must specifically reference the qualifying reason for the leave or the need for the leave.
- As set forth in the final regulation, employees must respond to employers' inquiries designed to determine whether leave is FMLA-qualifying. If they do not, employees risk losing FMLA protection if the employer is unable to determine whether the leave qualifies.
- The DOL's final rule eliminates language in the current regulations to the effect that an employer cannot delay or deny FMLA leave if an employee fails to follow the employer's usual notice and procedural requirements for calling in absences and requesting leave. In its stead, under the final regulations, absent unusual circumstances, employees may be required to follow established call-in procedures (so long as they comport with the regulations), and failure to properly notify employers of absences may cause a delay or denial of FMLA protections.
- The final rule eliminates language that employers cannot enforce FMLA notice requirements if those requirements are stricter than the terms of a collective bargaining agreement, state law or employer leave policy.

Employee Notice Requirements For Unforeseeable FMLA Leave (§ 825.303)

- The final rule maintains the requirement that an employee provide notice as soon as practicable under the facts and circumstances of the particular case (i.e., the same standard as notice for foreseeable FMLA leave). The DOL explains that it should be practicable to provide notice of unforeseeable leave within the time frame set forth by the employer's usual and customary notice requirements applicable to such leave.
- Consistent with its final rule for foreseeable FMLA leave, the DOL requires that the employee provide the employer with sufficient information to put the employer on notice that the absence may be FMLA-protected when the leave is unforeseeable.
- In the case of unforeseeable leave, if the employee calls-in with the simple statement that the employee or the employee's family member is "sick" *without* providing

more information, such notice will *not* be considered sufficient notice to trigger an employer's obligations under the Act. The final rule also states that the employer must inquire for additional information if needed to determine whether the leave requested qualifies for FMLA. In turn, the employee is obligated to respond to an employer's inquiries and failure to do so may result in denial of FMLA protection.

- An employee must comply with the employer's usual procedures for calling-in and requesting unforeseeable leave, except when unusual circumstances exist (such as when the employee or a family member needs emergency medical treatment). Absent unusual circumstances, if an employee fails to follow the employer's call-in procedures, the employer may delay or deny FMLA coverage until the employee complies with the rules.

Medical Certification (§§ 825.305, 825.306, 825.307)

- Consistent with modifications made to other FMLA notice regulations, an employer may request medical certification from the employee within five (5) business days of receiving the employee notice.
- The final rule provides that the time frame afforded an employee for submitting a medical certification is 15 days for both foreseeable and unforeseeable leave.
- Under a new DOL standard addressing the completeness and sufficiency of certification, "a certification is considered incomplete if the employer receives a certification, but one or more of the applicable entries have not been completed." This final rule also defines an insufficient certification as one where the information provided is "vague, ambiguous or non-responsive."
- Turning to the process for curing an incomplete or insufficient certification, the final rule provides that when an employer determines that a certification is incomplete or insufficient, the employer must state in writing what additional information is necessary and provide the employee with seven (7) calendar days to cure the deficiency. Additional time must be allowed where the employee notifies the employer within the seven (7) calendar day period that s/he is unable to obtain the additional information despite diligent good faith efforts. If the deficiencies specified by the employer are not corrected in the resubmitted certification, the employer may deny FMLA leave.
- The final rule states that a certification never submitted to the employer does not qualify as an incomplete or insufficient certification but constitutes a failure to provide certification.
- The DOL makes clear that it is the employee's responsibility either to provide such a complete and sufficient certification or to furnish the health care provider providing the certification with any necessary authorization from the employee or the employee's family member – such as that required by Health Insurance Portability and Accountability Act ("HIPAA") – in order for the health care provider to release a sufficient and complete certification to the employer to support the employee's FMLA request.
- A provision was added allowing for annual medical certifications in those circumstances where the serious health condition extends beyond a leave year. Such certifications are subject to authentication and clarification, including second and third opinions.

Certification Requirements

- The DOL made the following revisions to the medical certification form: (i) the pertinent specialization and fax number of the health care provider must be provided; (ii) the health care provider may provide information on the diagnosis of the patient's health condition (however, such a diagnosis is not a necessary component of a complete FMLA certification); and (iii) the health care provider must certify that intermittent or reduced schedule leave is medically necessary.
- Pursuant to the requirement that a complete certification contain appropriate medical facts regarding the patient's health condition for which FMLA leave is requested, the DOL provides guidance as to what constitutes sufficient medical facts for purposes of responding to this question (i.e., information on symptoms, hospitalization and doctors visits, whether medication has been prescribed, referrals for evaluation or treatment or any other regimen of continuing treatment).
- The DOL posits new language clarifying that employees need not sign a release as part of the medical certification process.
- The DOL has created new medical certification forms for use when employees request leaves for themselves for a serious health condition (Appendix B to the final regulations), as well as a different form for use when the employee seeks leave for the serious health condition of a family member (also Appendix B). In the employee's certification for his/her own serious health condition, the healthcare provider must now identify the job functions the employee is unable to perform.

Interaction Between FMLA and Employer Policies

- The final rule explains that if the employer is permitted “to request additional information” from the workers’ compensation health care provider, the FMLA does not prevent the employer from following the workers’ compensation provisions.
- In an effort to clarify the interaction between paid leave under sick leave or benefit plans and FMLA leave, the DOL explains that if an employee ordinarily is required to provide additional medical information to receive payments under a paid leave plan or benefit plan, an employer may require that the employee provide the additional information to receive those payments, as long as it is made clear to the employee that the additional information is requested only in connection with qualifying for the paid leave benefit. Any information received in accordance with such policy or plan can be considered in determining whether the employee is entitled to FMLA leave. However, if an employee does not provide the information required for receipt of such additional benefits or payments, the failure to provide such information does not affect the employee’s unpaid FMLA leave entitlement.

Interaction Between FMLA Certification and ADA Medical Inquiries

- Where a serious health condition also may be a disability under the ADA or workers’ compensation laws, the DOL clarifies that employers are not prevented from following the procedures under the ADA or workers’ compensation laws for requesting medical information. In addition, information received pursuant to such procedures may be considered in determining the employee’s entitlement to FMLA leave.

Authentication and Clarification of Medical Certification

- In lieu of the current requirement that the employee provide permission for the employer to clarify the medical certification, the DOL explains that contact between the employer and the employee’s health care provider for the purpose of clarifying the medical certification must comply with the HIPAA Privacy Rule. Language also has been added to make clear that if such consent is not given, an employee may jeopardize his or her FMLA rights if the information provided is incomplete or insufficient.
- Significantly, the DOL has determined that employers should be allowed to contact the employee’s health care provider directly for the purposes of authenticating and clarifying the medical certification. Accordingly, the new

proposal eliminates the requirement that the employer’s health care provider, as opposed to the employer itself, contact an employee’s health care provider. However, the final rule provides that such contact by the employer can *only* be made by a health care provider, a human resources professional, a leave administrator or a management official. The employee’s direct supervisor is *not* permitted to contact the employee’s health care provider.

- To facilitate the second opinion process, the DOL requires the employee (or family member) to authorize the release of relevant medical information regarding the condition for which leave is sought from the employee’s (or family member’s) health care provider to the second or third opinion provider.

Recertifications (§ 825.308)

- Presently, a recertification request may be made by employers no more often than every 30 days in conjunction with an FMLA absence, unless a minimum duration of inability to attend work has been set forth in the certification, in which case recertification generally may not be required until the specified duration has lapsed. If the medical certification indicates that the minimum duration of the condition is more than 30 days, an employer must wait until that minimum duration expires before requesting recertification. However, as a fail-safe, the final rule permits employers to obtain recertifications every six months in circumstances where the minimum duration of the condition exceeds 30 days.
- The final regulation also provides that recertification may be requested in less than 30 days if the employee requests an extension of leave, the circumstances have changed significantly based on the duration or frequency of the absence or the nature or severity of the illness, or if the employer receives information that casts doubt upon the employee’s stated reason for the absence or the continuing validity of the certification.
- As part of the information allowed to be obtained on recertification, the employer may provide the health care provider with a record of the employee’s absence pattern and ask the health care provider if the serious health condition and need for leave is consistent with such a pattern.

Fitness-For-Duty Certification (§ 825.312)

- The final regulation replaces the requirement that the certification need only be a “simple statement” with the statutory language that the employee must obtain a certification from his or her health care provider that the employee is able to resume work.

- An employer may require that the fitness-for-duty certification address the employee's ability to perform the essential functions of the employee's job so long as the employer has provided the employee with a list of the essential job functions no later than with the designation notice. The designation notice must indicate that the fitness-for-duty certification will address the employee's ability to perform the essential functions of the job.
- The DOL explains that an employer is permitted to require an employee to furnish a fitness-for-duty certificate up to once every 30 days if an employee has used intermittent leave during that period and reasonable safety concerns exist.
- For purposes of authenticating and clarifying the fitness-for-duty statement, the employer may contact the employee's health care provider consistent with the procedures set forth in § 825.307(a).

Expansion of Family Leave to Family of U.S. Military Servicemembers

On January 28, 2008, President Bush signed into law the National Defense Authorization Act for 2008 ("NDAA"). This new law amended the FMLA to include new sections regarding special FMLA coverage for families of U.S. military servicemembers.

The first provision, which was effective January 28, 2008, provides up to 26 weeks of protected unpaid leave in a single 12-month period to military caregivers. This leave is available to any eligible employee who is the spouse, child, parent, or next-of-kin (i.e., closest blood relative) of a covered servicemember with a serious injury or illness incurred during active duty. § 825.127. The second provision, which becomes effective on January 16, 2009, permits an otherwise eligible employee to take up to 12 weeks of leave in a 12-month period as a result of a "qualifying exigency" when the employee's spouse, son, daughter or parent is on active duty or has been notified of an impending call to duty in the U.S. Armed Forces in support of a "contingency operation or has just returned from such duty." § 825.126.

As mentioned in our February 2008 Client Alert, the amendment's military caregiver provisions are significant not only because they more than double the available leave time to those employees who care for servicemembers who are temporarily disabled due to an injury or illness, but also because they extend the leave benefit beyond parents, children, and spouses to next-of-kin, meaning nearest blood relative of the injured or ill servicemember. Both types of military-related leave may be taken intermittently, on a reduced hours basis or all at once, just like other forms of FMLA leave. §§ 825.200, 825.202-825.205. Similarly, accrued paid leave may be substituted or required to be substituted for

this unpaid leave in the same manner as for other forms of FMLA leave. § 825.207.

The final regulations contain new sections that address the interpretation and implementation of the new NDAA leave entitlements, including eligibility and certification requirements. Where appropriate, the FMLA regulations have been updated to incorporate the military-related leave entitlements into the existing FMLA framework. New suggested forms – attached as Appendices G (Qualifying Exigency) and H (Certification for Serious Injury or Illness of Covered Servicemember) to the final regulations – will assist employers in complying with the NDAA.

Definitions Specific to NDAA and Military-Related Leaves (§ 825.122)

The final regulations clearly define who are eligible family members of covered servicemembers and covered military members for purposes of the new military-related leaves.

- *Next of Kin of a Covered Servicemember:* The nearest blood relative other than a spouse, parent, son, or daughter, with priority given to blood relatives who have been granted legal custody, followed by brothers and sisters, grandparents, aunts and uncles, and first cousins. The next of kin can also be designated in advance by a servicemember. Special rules apply, however, to spouses employed by the same employer and limit them to a combined total of 26 weeks of such leave in a 12-month period. § 825.127(d).
- *Son or Daughter:* As has always been the case, leave to care for a child includes not only the employee's biological child, but also an adopted or foster child, stepchild, legal ward, or a child for whom the employee stood in loco parentis, though it does not include sons- and daughters-in-law.
- *Parent:* The definition of parent of a covered servicemember or military member is equally expansive and includes the servicemember's biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the covered service member; though it too does not include parents-in-law.

Leave Because of a Qualifying Exigency (§ 825.126)

- The regulations identify 8 different exigencies that qualify eligible employees for FMLA leave in connection with the employee's spouse, son, daughter, or parent ("covered military member"), being on active duty or called by the U.S. military to active duty status. This leave is referred to herein as "Exigent Circumstances Leave" and allows an employee to take leave in the following circumstances:

(1) *Short Notice Deployment*; (2) *Military Events and Related Activities*; (3) *Childcare and School Activities* – when, as a result of a covered military member’s active duty or call to active duty status, the covered employee is required to arrange for alternative childcare arrangements, provide childcare on an urgent, immediate basis, enroll or transfer a child to a new school or daycare center, or attend meetings with staff at a school or daycare facility; (4) *Financial and Legal Arrangements* – a covered employee may take leave to make financial or legal arrangements that address the covered military member’s absence while on active duty or call to active duty status; (5) *Counseling*; (6) *Rest and Recuperation* – covered employees may take up to five days of leave to spend with a covered military member who is on short-term, temporary, rest and recuperation leave during the period of deployment. The employee is entitled to five days of leave for each instance of rest and recuperation leave up to a maximum of 12 weeks in a 12-month period; (7) *Post-Deployment Activities* – for example, to attend arrival ceremonies, reintegration briefings; and/or (8) *Additional Activities* – if agreed upon by the employer and the employee.

- The regulations clarify that Exigent Circumstances Leave is *not* available to family members of all servicemembers, such as family members of individuals in the Regular Armed Forces. Rather, for purposes of Exigent Circumstances Leave, “covered military members” include only those members called or ordered to active duty as part of a contingency operation, who are retired members of the Regular Armed Forces, or members of the retired Reserve, the Ready Reserve, the Select Reserve, the Individual Ready Reserve, or the National Guard. The rationale for excluding members of the Regular Armed Forces from taking this leave is that members of the Regular Armed Forces (career military personnel) and their families have accepted the terms and conditions of a career in the military, whereas individuals who are retired or in reserve forces and their families will likely suffer much greater disruption in their lives due to being called to active duty, and are likely to need leave to address needs arising because of the unexpected disruption.

Leave to Care for a Covered Servicemember with a Serious Injury or Illness (§ 825.127)

- The new leave entitlement for eligible employees who need time off from work to care for a covered servicemember with a serious injury or illness is the most expansive leave provision in the amended FMLA. Such leave is not only available to the spouse, son, daughter, or parent of a covered servicemember, but also to next of kin, and it provides up to 26 weeks of leave, not just 12 weeks of leave. For this leave, referred to as “military

caregiver leave,” the term “covered servicemember” includes members of the National Guard or Reserves, the Regular Armed Forces, and the National Guard and Reserve who are on the temporary disability retired list, who have a serious injury or illness incurred in the line of duty on active duty for which they undergo medical treatment, recuperation, or therapy; or who are otherwise in outpatient status; or on the temporary disability retired list are all covered. Former members of the Armed Forces, National Guard, or Reserves, and members on the *permanent* disability retired list are not included as “covered servicemembers.” § 825.127(a).

- The regulations define a serious injury or illness as an injury or illness incurred by a covered servicemember “*in the line of duty on active duty*” that may render the servicemember medically unfit to perform the duties of his or her office, grade, rank, or rating.
- This leave is to be applied on a per-covered-servicemember, per-injury basis. This means that an employee may be entitled to take more than one period of 26 workweeks of leave during the course of his or her employment if the leave is to care for different covered servicemembers or to care for the same servicemember with a subsequent injury or illness. However, no more than 26 workweeks of leave may be taken within any single 12-month period. Further, leave not taken in the 12-month period is forfeited.
- The final regulations describe how the military caregiver leave interacts with other FMLA leave entitlements. An eligible employee is entitled to a combined 26 workweeks of leave for any FMLA-qualifying reason during the single 12-month period that begins when an employee first takes leave to care for a covered servicemember. However, leave is still limited to 12 workweeks for all other FMLA-qualifying reasons.
- When leave qualifies as both military caregiver leave and leave to care for a family member with a serious health condition during a single 12-month period, the employer must designate the leave as military caregiver leave and not as leave to care for a family member with a serious health condition.

Designation of 12-Month Period (§ 825.200)

- The 12-month period in which an eligible employee may take Exigent Circumstances Leave can be designated by the employer as the calendar year, any fixed 12-month period, a 12-month period measured forward from the date of an employee’s first day of FMLA leave or a “rolling” 12-month period *measured backward* from the date an employee uses any FMLA leave. If an employer

determines the 12-month period on a rolling backward basis for other leaves (e.g., for the birth of a child), the same method would be used for determining entitlement to exigent circumstances leave.

- In contrast, the 12-month period in which an eligible employee may take *military caregiver leave* must be calculated on a *going forward basis* starting with the first day the leave is taken. If the employee does not take all 26 workweeks of leave to care for the covered servicemember during this single 12-month period, any remaining military caregiver leave is forfeited.
- Depending on how the employer calculates the 12-month period for other types of FMLA leave, it is possible that an employee who has just returned from 12 weeks of FMLA leave for another reason, such as his or her own serious illness or the birth of a child, would immediately qualify for up to another 26 weeks of military caregiver leave. Employers who wish to change the way they calculate the 12-month period so that all 12 month periods are determined on a going forward basis starting from the first day of an employee's leave may do so on 60 days' notice to employees.

Certification for Leave Taken Because of a Qualifying Exigency (§ 825.309)

- An employer may require the employee to provide a copy of the covered military member's active duty orders or other documentation issued by the military which indicates that the covered military member is on active duty or on call by the U.S. military to active duty status in support of a contingency operation, as well as the dates of the covered military member's active duty service. Additional information may include facts regarding the "exigency" and the date of its commencement. This information only needs to be provided to the employer once. See Appendix G to the final rules for the DOL's recommended form.
- If an employee requests leave because of a qualifying exigency on an intermittent or reduced schedule basis, s/he must provide an estimate of the frequency and duration of the qualifying exigency.

Certification for Leave Taken to Care for a Covered Servicemember (§ 825.310)

- When leave is taken to care for a covered servicemember with a serious injury or illness, an employer may require an employee to obtain a certification completed by an authorized health care provider of the covered servicemember. The employer can request that the health care provider furnish its contact information, whether the

covered servicemember's injury or illness was incurred in the line of duty on active duty, the approximate date on which the serious injury or illness commenced, and its probable duration, information sufficient to establish that the covered servicemember is in need of care and an estimate of the amount of time the covered servicemember will require care. The DOL has developed an optional form – Appendix H to the final regulations – that employers can provide employees for certification purposes. Any other form containing the same basic information may be used. However, an employer may not request any additional information that is not specified in this section.

- As with other leave entitlements under the FMLA, it is the employee's responsibility to provide the employer with complete and sufficient certification and failure to do so may result in the denial of FMLA leave.

* * *

If you have any questions about the new FMLA regulations and/or need assistance in updating your FMLA policies, please contact your Proskauer relationship attorney or any of the attorneys in Proskauer's Employment Law Counseling & Training Practice Group who are listed in this Client Alert. In addition, if you would like copies of the DOL's new FMLA forms, please contact us.

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Client Alert

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