

### DOL Issues Final FMLA Regulations

The Family and Medical Leave Act (FMLA) has provided unpaid leave for the birth or adoption of a child and/or serious health conditions of an employee or an immediate family member for over fifteen years. In January, President Bush signed into law a defense authorization bill (H.R. 4986) which amended the FMLA in several significant ways. The amendments expanded the class of FMLA-eligible employees to include military service members and their families, and provide for two new kinds of leave: caregiver leave (caring for a family member who is a member of the military and sustained a qualifying injury or illness in the course of active duty) and exigency leave (tending to any "qualifying exigency" occasioned by the family member's call to active duty in the armed services).

On November 17, 2008, the Department of Labor (DOL) published its final rules under the amended FMLA. Among other things, the new final rules:

- Revise the FMLA's definitions of "serious health condition," "incapacity," and "continuing treatment." Specifically, the first visit to a health care provider (whether then followed by a successive visit within 30 days or a regimen of treatment such as antibiotics) now must occur within seven days of the start of the incapacity, and for continuing treatment involving two or more doctor visits, those visits now must occur within 30 days of the start of the incapacity. Additionally, the definition of "chronic condition" has been revised to require at least two visits a year to a health care provider for treatment of the condition;
- Expand employers' rights to demand additional information from employees and initiate direct contact with a certifying health care provider (with employee permission), to clarify and/or authenticate an otherwise incomplete or insufficient medical certification form;
- Define "qualifying exigency," for the purposes of implementing the new provisions entitling military service members to exigency leave, to include the following: (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;
- Define "covered servicemember" and "serious illness or injury" for the purpose of administering military caregiver leave, clarifying that the leave entitlement applies on a per-covered servicemember, per-injury basis and that the 12-month period begins with the first day an eligible employee takes military caregiver FMLA leave, and provide for certifications of the need for caregiver leave;
- Require employees who become aware of qualifying serious health conditions fewer than 30 days in advance of the need for leave to provide notice of the need for leave either the same day or next business day, as well as comply with the employer's usual and customary notice and procedural requirements for requesting leave,

absent unusual circumstances;

- Reiterate that an employee can settle, waive or release FMLA claims based on past employer practices without DOL or court supervision or participation, but also reaffirm that an employee cannot waive or settle prospective FMLA rights;
- Clarify employee eligibility following breaks in service and/or extended leaves;
- Allow employers to require "fitness for duty" certifications to address an employee's ability to perform the essential functions of the position at the conclusion of a covered leave;
- Clarify the administration of intermittent leave, including an explanation of when an employee may be transferred during intermittent or reduced schedule leave; and
- Require employers to provide employees with general notice about the FMLA, as well as eligibility notice (an employer now has five, instead of two, business days to provide), rights and responsibilities notice, and designation notice.

Prior to the effective date of January 16, 2009, employers should focus on training employees, revising existing policies, and establishing procedures for compliance with the new rules. To guide employers as they plan for these changes, the Labor and Employment Group at Post & Schell, P.C. is positioned to address your questions and assist in training and policy drafting. In addition, we will be publishing our analysis of the amended FMLA and DOL's new final rules in the near future.

*If you have any questions regarding this E-Flash, the FMLA, or the DOL's new regulations, or to discuss employee training programs available, please contact Post & Schell, P.C. Labor and Employment Attorneys Jim Johnston (215-587-1099), Andrew Allison (215-587-1161), Sid Steinberg (215-587-1140), Vince Candiello (717-612-6024), Bill Flannery (717-612-6022) or Darren Creasy (215-587-6632).*

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