

DOL Regulations Clarify Key FMLA Provisions

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The U.S. Department of Labor issued a set of revised regulations covering the Family and Medical Leave Act (“FMLA”), which go into effect January 16, 2009, and provide guidance on a number of key areas that employers have struggled with since the law’s enactment in 1993.

While some of the major changes are covered below, the new regulations are available at:

www.dol.gov/esa/whd/fmla/finalrule.pdf.

Employees who have worked with an employer for 12 months are eligible for FMLA protection. As in the past, the employee need not work 12 consecutive months, but the new regulations state that employment periods prior to a break in service of seven (7) years or more need not be counted in determining eligibility, subject to some exceptions.

The new regulations also discuss “serious health conditions” for incapacities of more than three consecutive calendar days accompanied by either (a) two or more treatments by a health care provider or (b) one treatment by a healthcare provider which results in a regimen of continuing treatment under the supervision of the health care provider. The new regulations clarify that (1) the period of incapacity must be “more than three, consecutive, **full** calendar days;” (2) treatments by a health care provider require an “in-person visit to a health care provider;” (3) “two or more treatments” must be within the first 30 days of incapacity, absent extenuating circumstances; (4) the first treatment visit must take place within seven days of the first day of incapacity; and (5) any determinations of whether additional treatment visits or

regimens of continuing treatment are necessary shall be made by the health care provider, not the employee.

Under the old regulations, employers generally had two (2) business days after learning of the employee's FMLA-qualifying condition to notify the employee that the leave would be designated as FMLA leave. The new regulations give employers five (5) business days.

The old regulations only permitted physicians representing the employer to seek clarification and/or authentication of medical certifications. Now employers may contact an employee's health care provider directly once certain conditions have been met. Also, whereas the old regulations generally limited fitness-for-duty certifications to a simple statement of an employee's ability to return to work, employers may now require fitness for duty certifications that address an employee's ability to perform the essential functions of the job.

Under the old regulations, employers were prohibited from imposing any limits on the substitution of paid vacation or personal leave for unpaid-FMLA leave. Now, an employee's ability to substitute accrued paid leave for unpaid FMLA leave is determined by the terms and conditions of the employer's normal leave policy.

The old regulations did not address whether failure to work mandatory overtime counted as FMLA leave. The new regulations state that where an employee normally would be required to perform overtime work, the employee may be charged FMLA leave for the overtime hours not worked.

The new regulations also contain new FMLA prototype forms, which are available online at <http://www.dol.gov/whd/forms/index.htm>.

For more information contact scott@schaffer-law.com or (860) 216-1965.

www.schaffer-law.com