

THE BOTTOM LINE

Family and Medical Leave Act

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Serious Health Condition

- Old rule
 - Definition of “serious health condition” includes an employee who takes leave involving more than 3 consecutive calendar days of incapacity + 2 visits to a healthcare provider
- New rule
 - Clarifies that the 2 visits to the healthcare provider must occur within 30 days of the onset of the period of incapacity
 - The first of those 2 visits must occur within 7 days of the first day of incapacity

Serious Health Condition (Continued)

- Old rule
 - Definition of “serious health condition” includes an employee who takes leave involving more than 3 consecutive calendar days of incapacity + a regimen of continuing treatment
- New rule
 - Clarifies that the first visit to the healthcare provider must take place within 7 days of the first day of incapacity

Serious Health Condition (Continued)

- Old rule
 - Definition of “serious health condition” includes an employee who makes “periodic visits” to a healthcare provider for a chronic serious health condition
- New rule
 - Defines “periodic visits to a healthcare provider” to require at least 2 visits to a healthcare provider per year

Intermittent Leave

- Old rule
 - Employee who takes intermittent leave for planned medical treatment must attempt to schedule treatment so as not to unduly disrupt the employer's operations
- New rule
 - Employee now has an obligation to make a reasonable effort to schedule medical treatment so as not to unduly disrupt the employer's operations

Intermittent Leave (Continued)

- Old rule
 - Accounting for intermittent leave must be in the smallest increment that the employer's timekeeping system can handle
- New rule
 - Accounting for intermittent leave can be in the smallest increment that the employer uses to account for other types of leave, not greater than 1 hour

Intermittent Leave (Continued)

- New rule
 - The new regulations create a narrow “physical impossibility exception” whereby if it is physically impossible for an employee using intermittent or reduced schedule leave to start or leave a shift, the entire period that the employee is forced to be absent is designated as FMLA leave
 - e.g., a 3-hour absence for intermittent leave causes a train conductor to miss his 7-hour shift on the train
 - The entire 7 hours counts as FMLA leave

Medical Certification

- New rule
 - Employer may contact the employee's healthcare provider directly for clarification and authentication of the medical certification
 - The employer must give the employee written notice of the additional information needed and allow the employee 7 days to cure the deficiency
 - The employer representative contacting the healthcare provider must be an HR professional, leave administrator or management official, and not the employee's direct supervisor

Medical Certification (Continued)

- New rule
 - Employee is not required to permit his or her healthcare provider to communicate with the employer, but if the employee denies the employer permission and does not otherwise clarify an unclear certification, the employer may deny FMLA leave
 - Prior to making contact with the healthcare provider, however, the employer must provide employee an opportunity to resolve any deficiencies in the certification

Medical Certification (Continued)

- Old rule
 - An employer has 2 business days after the employee provides notice of the need for FMLA leave to request a medical certification
- New rule
 - An employer has 5 business days after the employee provides notice of the need for FMLA leave to request a medical certification

Fitness for Duty Certifications

- Old rule
 - An employer may enforce policies or practices that require all similarly situated employees who take leave to provide a certification that they are able to return to work
- New rule
 - An employer may require a fitness for duty certification to address an employee's ability to perform essential job functions
 - The employer must provide the employee with a list of essential job functions no later than the Designation Notice and specify that the fitness for duty certification must address the employee's ability to perform those essential job functions
 - This does not apply to a request for intermittent leave, unless a reasonable job safety concern exists

Substitution of Paid Leave

- Old rule
 - Paid leave may be used concurrently with unpaid FMLA leave
- New rule
 - An employer must allow concurrent usage of paid vacation, personal leave or PTO during FMLA leave
 - The employer may limit use of paid leave to situations for which the employer would normally provide such paid leave
 - Ex: FMLA leave for the employee's own health condition or that of specific family members

Substitution of Paid Leave

- New rule
 - If the employer's paid sick leave policy prohibits the use of sick leave in less than full day increments, the employee would have no right to use less than a full day of paid sick leave regardless of whether the sick leave was being used concurrently with unpaid FMLA leave

Employee Notice Obligations

- Old rule
 - An employee must provide at least 30 days advance notice when the need for FMLA leave is foreseeable
- New rule
 - When an employee becomes aware of a need for FMLA leave less than 30 days in advance, the employee should provide notice of the need for leave to the employer either that same day or the next business day
 - When the employee is required to provide 30 days notice of leave and fails to do so, the employee must explain the reasons why giving such notice was not practicable, upon the employer's request for such information

Employee Notice Obligations

(Continued)

- Old rule
 - When the need for FMLA is not foreseeable, the employee must provide a notice to the employer of the need for leave “as soon as practicable”
- New rule
 - When need for FMLA leave is not foreseeable, the employee must provide notice to the employer promptly in the same way that any other employee would provide notice of the need for non-FMLA time off

Employee Notice Obligations

(Continued)

- Old rule
 - An employer must respond to an employee's request for leave in 2 business days of the employee's request for leave or of the employer acquiring knowledge that the leave may be FMLA qualified
- New rule
 - An employer must respond to an employee's request for FMLA leave by providing the eligibility notice in 5 business days

Employee Notice Obligations

(Continued)

- Old rule
 - An employer may not count any FMLA leave against an employee's 12-week entitlement until after the employee provides all required notices
- New rule
 - An employee is not automatically eligible for FMLA leave just because the employer fails to provide the required eligibility notices to employees or provides incorrect information
 - If an employee suffers actual harm because the employer fails to follow the notification rules, the employer may be liable

Breaks in Employment

- Old rule
 - Employees are eligible to take FMLA leave if they have been employed by the employer for at least 12 months and have at least 1,250 hours of service in the 12-month period preceding the leave
- New rule
 - Clarifies that the 12 months of employment need not be consecutive
 - Generally, any period of employment prior to a continuous break in service of 7 years or more need not be counted

Light Duty

- New rule
 - Time spent by an employee working “light duty” does not count against the employee’s FMLA leave entitlement
 - The employee’s right to job restoration is held in abeyance while the employee performs light duty or until the end of the 12-month period that the employer uses to calculate FMLA leave, whichever occurs first

Perfect Attendance Awards

- New rule
 - Employers may deny a perfect attendance award, bonus for hours worked, or bonus for products sold to an employee who did not meet the goal because he took FMLA leave
 - But only if the employer treats employees taking non-FMLA leave in the same identical way

Military Leave Overview

- Qualifying exigencies
 - Definitions
 - Notice from employees
 - How you may obtain certification
- Military caregiver leave
 - Who can be a caregiver?
 - Notice, certification issues
 - New military FMLA calendar

Qualifying Exigency Leave

- Up to 12 weeks for qualifying exigency (QE) from active duty/call-up of spouse, child, or parent
- Only for families of National Guard, Reserves, retired military
- No QE leave for families of regular armed service members on active duty

Qualifying Reasons for QE Leave

- Short-notice deployment exigencies
 - 7 days notice of deployment or less
 - Up to 7 days leave
- Military events / ceremonies
- Urgent child care, school activities
 - Child: broadly defined

Listed Reasons for QE Leave

- Financial, legal tasks
- Counseling for employee, minor child
- R&R time
 - During deployment
 - Up to 5 days per break

Additional Qualifying Exigencies

- Post-deployment activities
 - Includes issues related to service member's death on active duty
- Other purposes relating to deployment, as agreed upon by employer, employee

Employee Notice for QE Leave

- Foreseeable: as soon as practicable, with this info:
 - Family member is on active duty or being called up
 - Reason for leave
 - Anticipated length of absence
- Unforeseeable: as soon as practicable

Who is a family member?

- For QE leave, family member defined broadly
- Example: son/daughter on active duty:
 - Biological, adopted or foster child
 - Stepchild or legal ward
 - Child for whom employee stood in *loco parentis*
 - Regardless of child's age

Certifying QE Leave

- You may require copy of active-duty orders one time for each service-member's call
- Optional DOL form (WH-384)
- Verification with third party permitted
- No recertification
- New certification for new order or new covered service member

Contents of Certification

- Information about QE, signed by employee, plus documentation
- Date on which QE started or will start
- Ending date if leave to be taken in block
- If leave to be taken intermittently, estimate of its frequency and duration
- If QE involves 3rd party (*e.g.*, school meetings), contact information and purpose of meeting

Military Caregiver Leave

- Up to 26 workweeks in a 12-month period
- To care for covered service member
 - Includes regular armed forces, Reserves, National Guard, or on temporary disability retired list (TDRL)
- Spouse, parent, child, or “next of kin” may give care; broadly defined
- You may ask for documentation of relationship

Who is next of kin?

- Service member's nearest blood relative (not counting spouse, parent or child) in this order:
 - Blood relatives with legal custody
 - Siblings
 - Grandparents
 - Aunts and uncles
 - First cousins

More Next of Kin

- If service member names another blood relative in writing as next of kin for care-giving, he goes to top of list
- You may request documentation of next-of-kin status; simple statement will suffice

Notice of Military Leave

- Foreseeable: at least 30 days or as soon as practicable
- Unforeseeable: as soon as practicable
- For all military caregiver leave, employee must tell you nature of leave, anticipated length of absence, if known
- Verbal notice OK

When is care needed?

- For serious illness/injury incurred in line of duty, on active duty
- As determined by U.S. Department of Defense (DOD)
- Service member medically unfit to perform duties of office, grade, rank or rating
- Undergoing medical treatment, therapy, recuperation, outpatient treatment or on temporary disability retired list (TDRL)

Certification Requirements

- You may require certification of active duty orders and status
- Optional DOL form WH-385
- You must accept DOD invitational travel orders/authorizations as certification
- Authentication, clarification OK; no second, third opinions; no recertification

Military Caregiver Certification

- May request medical info from HCPs with:
 - DOD
 - Veterans Affairs
 - DOD TRICARE authorized provider, in and out of network

Military Caregiver Calendar

- Military caregiver calendar begins on first day employee takes leave, ends 12 months later
- This calendar runs separately and in addition to regular FMLA calendar
- Guidance comes from DOL regs

2 Calendars, General Rules

- Eligible employee may take to up to 26 weeks of military caregiver leave in a single 12-month period
- 26 weeks = maximum eligible employee may take during the single 12-month period, counting both military caregiver leave, other FMLA leave

General Rules

- Employee continues to earn regular FMLA per regular FMLA calendar while taking military caregiver leave
- If employee uses 26 weeks of total leave in single 12-month period, she can use new “regular” FMLA only after military FMLA calendar ends

General Rules (Continued)

- Military caregiver FMLA applies to one service member and one injury/illness during single 12-month period
- Eligible employee may later be eligible to take military caregiver leave for
 - Same service member, different injury/illness
 - Different service member

What are your risks?

- Reimbursement for monetary losses
- Interest
- Attorney's fees
- Expert witness fees
- Court costs

The FMLA and the Bottom Line

- Know your rights as an employer
- Know what could be an interference with an individual's rights
- Avoid acts that could be seen as retaliation

THE BOTTOM LINE

McAFEE & TAFT
ATTORNEYS & COUNSELORS

Questions?