



WAW Business Law Briefings

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Changes to the FMLA and ADA - Are You Ready?

Beginning January 16, 2009, employers with 50 or more employees will be responsible for complying with the newly enacted Family and Medical Leave Act Regulations ("Final Regulations"). The Final Regulations are broad ranging and cover many areas of the FMLA, including what constitutes a serious health condition; employee notification obligations; how and when to designate leave as FMLA qualifying; and leave entitlements for family members of service members.

Timely compliance with the Final Regulations before they become effective on January 16, 2009, is not only mandatory, but makes good business sense. While this article presents only a selection of the numerous issues and changes, it is critical for a company in today's economy to fully understand the broad reaching implications of the FMLA's Final Regulations.

The Final Regulations represent a compromise

between employers and employees - granting additional leave entitlements to employees, but providing employers with much needed control over when an employee can take leave. For example, an employer may delay leave to an employee who fails to provide 30 days notice of the need for foreseeable leave. Additionally, an employee is required to follow the employer's usual notice and procedural requirements for calling in absences and requesting leave, absent unusual circumstances, and the employer may lawfully delay leave (and in some circumstances deny leave) for the employee's failure to follow established procedures.

The Final Regulations also provide additional clarification as to what constitutes a serious health condition. For example, in order for a medical condition to qualify as a chronic condition under the FMLA, the employee must visit a healthcare provider for treatment of the relevant condition at

see FMLA page 2

Leave Benefits for Service Member's Family

The Final Regulations for the FMLA also include guidance on the newly enacted National Defense Authorization Act ("NDAA"), which provides enhanced leave benefits for family members of uniformed service members. The Final Regulations provide up to 12 weeks of leave for relatives of those called to active duty in the National Guard and Reserves (but not regular active duty military members), for qualifying "exigencies," such as: short notice deployment (defined as seven or less calendar days prior to the date of deployment); military events and activities; childcare and school activities; financial and legal arrangements;

counseling; rest and recuperation (meaning that the employee may take up to five days of leave to spend time with a covered Military member who is on short-term temporary rest and recuperation leave during the period of deployment); and post-deployment activities.

With the new provisions regarding service members, an eligible employee who is the spouse, son, daughter, parent or next of kin to a covered service member may also take up to 26 work weeks of leave during a 12 month period to care for a seriously injured or ill service member. The military caregiver leave may only

see SERVICE MEMBER page 2

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FMLA from page 1

least twice per year. To be eligible for FMLA under the "incapacity and treatment" prong of the definition of a serious healthcare condition, the Final Regulations require that an employee seek treatment within seven days of the first day of incapacity.

For purposes of demonstrating the existence of a qualifying serious healthcare condition under the continuing treatment provision, two visits to a healthcare provider must take place within 30 days of the start of the period of incapacity, except where extenuating circumstances prevent the employee from meeting this requirement. In response to employers' concern that employees could manipulate the scheduling of appointments to ensure two visits within 30 days, the regulations now require that healthcare providers, not the employee, must make the determination as to whether a second visit during the 30 day period is needed.

SERVICE MEMBER from page 2

be taken once per injury, but more than one family member may qualify for it.

The military caregiver leave only applies to current members of the Regular Armed Forces, National Guard or Reserves, and members of the Regular Armed Forces, National Guard or Reserves who are on the temporary disability retirement list. Former members of the Regular Armed Services, National Guard and Reserves and members on the permanent disability retired list are not considered "covered service members."

The Americans with Disabilities Act New Amendments Effective January 1, 2009

The Americans with Disabilities Act Amendments Act of 2008 was signed into law on September 25, 2008 and becomes effective January 1, 2009. The ADA Amendments Act significantly expands the number of employees who can be considered disabled but will do little to bring clarity to this complicated area of law. Although the Act continues to define a disability as an impairment that substantially limits a major life activity, employers are no longer permitted to consider mitigating measures, such as medication, prostheses, and similar ameliorative benefit in determining whether someone is disabled. One exception, however, is eyeglasses and contact lenses; these items can be considered when determining whether someone is disabled.

The ADA Amendments Act also expands the definition of "major life activities," again increasing the number of employees

who will now qualify as disabled under the act. Major life activities include: caring for oneself; bending; performing manual tasks; speaking; seeing; breathing; hearing; learning; eating; reading; sleeping; concentrating; walking; thinking; standing; lifting; communicating; and working. It also includes the ability to perform major bodily functions defined as "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."

FMLA Certification vs. ADA Medical Inquiries

Responding to concerns expressed by employers that a request for FMLA leave may also trigger the Americans with Disabilities Act's interactive process, the Final Regulations for the FMLA provide that, where an employee's serious healthcare condition may also be a disability, employers are not prohibited from following the procedures under the ADA for requesting medical information simply because the employee is also seeking or receiving FMLA leave.

Note About the Author

Jill M. Lowell is a member of WAW's litigation team and has extensive experience in the field of employment law. She counsels employers on a broad range of issues including compliance with state and federal discrimination, leave, and disability laws. She also drafts employment and severance agreements, and advises companies on how to avoid potential costly litigation when downsizing.

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