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# FMLA Amendments: Significant Changes and Their Impact

Christopher K. Ramsey  
Morgan, Lewis & Bockius, LLP

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# FMLA Amendments: Significant Changes and Their Impact

## Today's Topics:

- Military Family Leave Amendments
- Proposed FMLA Regulations

# Family Military Leave Amendments: Background

- Two major developments:
  - Expanded leave to care for ill or injured service member.
  - Created new leave for a “qualifying exigency” related to military service.
  - Expanded leave provisions already in effect.

# Family Military Leave Amendments: Who is Covered?

- The new amendment provides leave for family members to provide care for “covered service members,” which would include a member of the Armed Forces, including the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy or who is otherwise in an outpatient status or on the temporary disability retired list for a serious injury or illness.

# Family Military Leave Amendments: What is Covered?

- A “serious injury or illness” is one that was incurred in the line of active duty which may render the Armed Services member medically unfit to perform the duties of the member’s rank.

# Family Military Leave Amendments: Duration of Leave

- Eligible employees may take up to 26 weeks of military family leave in a single 12-month period.
  - The 26 available weeks can be reduced by any regular FMLA leave taken.

# Family Military Leave Amendments: Leave to care for ill or injured service member

- Son, daughter, spouse, parent, or **next of kin** of a covered service member up to **26 weeks** of unpaid leave **in a single 12-month period** to care for service member.
  - Statute defines “next of kin” as the “nearest blood relative.”
  - “Next of Kin” – like grandparents, for example – did not typically qualify for FMLA leave.

# Family Military Leave Amendments: Exigency Leave

- Allows an employee to take up to 12 workweeks of leave for a “qualifying exigency” arising out of that employee’s spouse, son, daughter, or parent being on active duty or having been notified of an impending call or order to active duty in the Armed Forces in support of a contingency operation.

# Family Military Leave Amendments: Exigency Leave (Cont.)

- Probably addresses situations where an employee's life is significantly disrupted due to a family member's deployment, *but...*
  - Does not go into effect until DOL issues regulations defining "exigency."
  - DOL is "encouraging" employers to offer some form of emergency leave to eligible employees.

# Family Military Leave Amendments: Definition of “Exigency”

- Legislative history suggests that the types of leave intended to be covered include:
  - Making arrangements for child care;
  - Making financial and legal arrangements;
  - Attending counseling;
  - Attending official ceremonies or programs;
  - Attending to farewell or arrival arrangements; or
  - Attending to affairs caused by “missing” status or death.

# Proposed FMLA Regulations

- On February 11, 2008, the U.S. Department of Labor (DOL) published proposed regulations.
  - These are the first major regulatory updates in 15 years.
  - They are expected to be approved and implemented in some form by early next year.

# Proposed FMLA Regulations: Definition of Serious Health Condition

- The definition of “serious health condition” would continue to cover seemingly minor illnesses, like colds and stomachaches.
- DOL proposes two modest clarifications to existing regulations:
  - Two visits with a medical provider would need to be completed within 30 days of incapacity; and
  - “Periodic” would mean visiting a healthcare provider at least two times per year for the same condition.

# Proposed FMLA Regulations: Medical Certifications

- New proposal also would alter the following:
  - Time frame to correct a deficient certification;
  - An employer's ability to contact the employee's healthcare provider as part of clarification process;
  - The frequency that an employer may request recertification; and
  - The type of background information that an employee would need to provide in connection with a second-opinion process.

# Proposed FMLA Regulations: Content of Medical Certifications

- DOL proposes a simplified medical certification form that would:
  - Include more specific provisions for healthcare providers to provide medical facts;
  - Ask the healthcare provider to provide information on symptoms, doctor visits, and the medical treatment regimen to better enable employers to make a determination whether the leave qualifies under the FMLA; and
  - Specifically allow doctors to provide a diagnosis, which is not permitted under the current regulations.

# Proposed FMLA Regulations: Use of Intermittent Leave

- “No issue received more substantive commentary.”
- DOL *does not propose* to increase the minimum increment of intermittent leave.
- DOL does propose one helpful clarification:
  - If the employee would be required to work overtime hours, then the hours the employee would have been required to work (but did not) may be counted against the employee’s FMLA entitlement.

# Proposed FMLA Regulations: Employer's Paid Leave Policy

- Proposal would permit employers to enforce the terms and conditions of their paid leave policies when an employee elects to substitute paid leave for unpaid FMLA leave.
  - Employer could enforce such terms and conditions regardless of the type of leave to be substituted.

# Proposed FMLA Regulations: Employer's Paid Leave Policy (Cont.)

- To avail themselves of this provision, however, employers would be required to:
  - Make employees aware of any restrictions associated with using paid leave *in writing*; and
  - Inform the employee that he or she remains entitled to unpaid FMLA leave.

# Proposed FMLA Regulations: Retroactive Designations

- The proposed regulations would allow employers to retroactively designate leave, provided that there is no individualized harm established by the employee.
- If there is a violation, DOL proposes to impose monetary relief (mirroring the relief provided by the statute as opposed to simply providing extended leave) on employers that fail to timely designate leave.

# Proposed FMLA Regulations: General Notice

Under the proposed regulations:

- Employers who do not maintain a handbook would be required to distribute a copy of the general notice to each employee at least once per year, either in paper or electronic form.
- It would no longer be sufficient to distribute general notice in connection with an FMLA leave request.

# Proposed FMLA Regulations: Eligibility Notice

Employers would be required to:

- Provide notice of eligibility and amount of leave available within five business days from request of leave
- If applicable, the employer must indicate the reasons why the employee is not eligible or has no FMLA leave remaining;
- Notify the employee of his or her right to take unpaid leave if the employee does not meet the terms and conditions of the employer's paid leave policies to substitute paid leave; and
- Include a statement of the employee's essential job functions if the employer will require that those functions be addressed in a fitness-for-duty certification.

# Proposed FMLA Regulations: Designation Notice

Under the proposed regulations:

- Employee now has 5 days to provide designation notice;
- Employers must inform the employee if the number of hours, days or weeks that will be designated as FMLA leave; and
- Employers must notify the employee if the leave taken is not designated as FMLA leave due to insufficient information or was taken for a non-FMLA-qualifying reason.

# Proposed FMLA Regulations: Enforcement of Employer Call-In Procedures

DOL proposes to change its position, stating that employees may be required to follow established call-in *procedures* in connection with an FMLA leave request.

- Employees still would not necessarily need to follow employer's restrictions *on the timing* of call-ins.
- Failure to follow such procedures would result in a delay or denial of FMLA protection.

# Proposed FMLA Regulations: Clarification of What Constitutes Sufficient Notice

- DOL proposes to clarify the standard as to what constitutes sufficient information from the employee to trigger the employer's obligations to consider FMLA eligibility.
- The employee would need to inform the employer:
  - That 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 anticipated duration of the absence; and
  - Whether the employee (or family member) intends to visit a healthcare provider or is receiving continuing treatment.

# Proposed FMLA Regulations: Other Issues

- Interplay of paid leave with disability benefits.
- Length of service requirement.
- Coverage to care for a family member
- Fitness for duty certificate.
- Perfect attendance awards.

# Proposed FMLA Regulations: Waiver and Release

- The proposed regulations change case law related to voluntary settlement of past FMLA claims:
  - Employers and employees can voluntarily agree to waive and release past claims.
  - No court or DOL approval is required.

# What Should Employers Do?

- Look carefully at current FMLA policies
  - Policies may need to be amended or developed to comply with the new regulations.
  - New employment policies should be considered in light of the Family Military Leave Amendment.

# Questions?

- Chris Ramsey, Morgan, Lewis & Bockius LLP:
  - [cramsey@morganlewis.com](mailto:cramsey@morganlewis.com)
  - 412.560.3323
  - [www.morganlewis.com](http://www.morganlewis.com)