

LABOR &
EMPLOYMENT

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Final Regulations Impose New Notice Requirements for Family Leave

The U.S. Department of Labor (“DOL”) has imposed new notice requirements on employers under the Family Medical Leave Act of 1993 (“FMLA”). The new requirements took effect on January 16, 2009.

The FMLA requires that employers provide employees up to 12 weeks of unpaid, job-protected leave during any 12-month period to care for an immediate family member (spouse, child or parent) or if the employee is unable to work due to a serious health condition. The DOL has updated its regulations interpreting the provisions of the FMLA, to clarify former interpretations and renumber and reorganize certain provisions. Among the many regulatory changes set forth in the final regulations, the DOL has revised both the employer and employee notice requirements. Specifically, the new regulations impose additional notice obligations and penalties on Employers while also extending the time period to provide certain required notices. The final rules also impose new obligations on employees requesting an FMLA leave, which should assist employers with the administration of such requests.

Employer Notices. The new regulations change the requirements on employers with respect to three types of notices to employees: general notices, eligibility notices, and designation notices.

New Delivery Requirements for the General Notice. A general notice is intended to provide employees basic information about their right to FMLA leave. Under the prior regulations, it was sufficient for an employer to post the general notice in the workplace (for example, in a lunch room or break room). The new regulations require that, in addition to posting, the employer must provide a copy of the general notice to each employee by including it in the employee handbook. If the employer does not have a written handbook, it must provide the notice to employees at the time of hire. In addition, if a “significant part” of the Employer’s workforce is not literate in English, the notice must be translated into a language those employees can read. The DOL has drafted a revised general notice form, which is available at www.dol.gov.

The new regulations also increase the penalty for an employer’s failure to provide the general notice from \$100 per day to \$110 per day.

More Time for Employer to Provide Notice of Eligibility and Designation Notice. Under the prior regulations, if an employee requested FMLA leave, the employers had only two days to determine whether the employee was eligible for the leave and to provide a notice of eligibility. The employer was also allowed only two days to provide the

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employee with a notice of the employee's rights and responsibilities which details expectations and obligations and an explanation of the consequences for failing to meet these conditions. Among other things, this notice describes the employee's right to substitute paid leave, and the conditions for doing so, as well as the availability of unpaid FMLA leave.

Under the new regulations, an employer now has five days from the date of the employee's request to provide the notice of eligibility for such leave. The notice of eligibility generally states whether FMLA leave is still available in the applicable 12-month period. If the employee is not eligible or has no FMLA leave available, the employer is now required to give at least one reason why the leave is unavailable.

Designation Notice. The final regulations continue the requirement that the Employer designate a requested leave as FMLA-qualifying (thereby counting against the 12-week permitted FMLA leave) and to provide the employee with a written designation as such. Under the final rules, this designation notice must be provided within five business days (formerly two business days) of the date when the Employer has sufficient information to determine whether a leave is being taken for an FMLA-qualifying reason and must include a description of any requirement for a fitness-for-duty certification that the employee must provide as a prerequisite to job restoration at the end of the FMLA leave. The new rules replace the prior requirement that the employee provide a "simple statement" with a requirement that the employee obtain a certification from his or her health provider that the employee is able to resume work.

The new regulations also specify that the Employer's failure to make timely designation of a requested leave as FMLA-eligible may constitute interference with the employee's FMLA rights and could result in Employer liability for lost compensation or benefits as a result of the violation.

Changes to Employee Notice Requirements. In the case of unforeseeable FMLA leave, the final regulations clarify that an employee "calling in sick" without providing more information, is not sufficient to trigger the employer's obligations under FMLA. Further, the new regulations require, absent unusual circumstances, an employee to follow the employer's usual and customary call-in procedures for reporting an absence and provides that the failure to do so may result in a delay or denial of the leave by the Employer until such time as the employee complies.

Hiscock & Barclay, LLP Recommendations. In view of these recent amendments, employers should conform their form of general notice to the updated FMLA form available at the DOL website. Employers which have an employee manual should update the manual to include the FMLA general notice, or contact a member of the Practice Area listed on the front of this Alert for guidance. Employers should also compare its other notices used for FMLA administration against the updated forms included as appendices to the final FMLA regulations. ■

If you require further information regarding the information presented in this Legal Alert and its impact on your organization, please contact any of the members of the Practice Area listed on the front of this Alert.