Honigman’s Labor and Employment Department 

presents 

The New FMLA Regulations – Best Practices to Ensure FMLA Compliance 

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Presenters
Matthew S. Disbrow 
Trisha M. Benson
On November 17, 2008, the Department of Labor ("DOL") published final rules implementing the first ever regulatory amendments to the FMLA.

Those new regulations take effect January 16, 2009.
Employee Eligibility

- An employee must be employed for 12 months and have worked 1,250 hours.

- The 12 months do not need to be consecutive.
  - Employment periods prior to a break of seven years do not need to be counted.
  - Exceptions to the seven-year rule.
  - An employer may elect to count employment periods beyond seven years. If the employer does so, however, it must count such time consistently for all employees.
Employee Eligibility

- Eligibility is determined at the time FMLA leave is planned to start.
- An employee may attain FMLA eligibility while on leave.
- Cannot count non-FMLA leave towards the employee’s 12-week FMLA entitlement.
Employee Eligibility

Time spent fulfilling National Guard or Reserve military obligations counts towards FMLA eligibility.
The FMLA defines “serious health condition” as either an illness, injury, impairment, or physical or mental condition that involves:

1. Inpatient care, hospice, or residential medical care facility; or
2. Continuing treatment by a health care provider.
Continuing Treatment for Incapacity

Continuing treatment includes a period of incapacity of more than three consecutive, full calendar days and subsequent treatment that involves:

1. Treatment two or more times, within 30 days of the first day of incapacity; or

2. One treatment with a health care provider, followed by a regimen of continued treatment.

“Treatment” must include an in-person visit to a health care provider within 7 days of the first day of incapacity.
Continuing Treatment for Chronic Conditions

A chronic serious health condition is one that requires periodic visits for treatment by a health care provider at least twice a year.
Leave for Pregnancy or Birth, Adoption or Foster Care

The Regulations clarify several issues:

- Leave for prenatal care or before placement.
- Leave for a condition that makes an expectant mother unable to work.
- Leave to care for an expectant spouse who is incapacitated.
- Leave for the birth of a child.
- Leave for a newborn child with a serious health condition.
Scheduling Intermittent Leave

An employee must make a “reasonable effort” to schedule planned medical treatment so as not to disrupt unduly the employer’s operations.
Transfer of an Employee on Intermittent Leave

- Transfer must be to a position with equivalent pay and benefits.
- Transfer is permitted when intermittent leave is foreseeable for planned medical treatment.
- Transfer is not permitted when the need for intermittent leave is not foreseeable.
Calculating Intermittent Leave

- Minimum Increments of Leave
- Mandatory Overtime
- Variable Schedules
- Counting for Holidays
Substitution of Paid Leave

- An employer may require an employee to substitute all forms of paid leave for otherwise unpaid FMLA leave.

- An employer may apply their normal paid-leave policies and requirements, so long as the employee is provided notice of the additional requirements.
Military Leave

Two types

- Military Caregiver Leave
- Qualifying Exigency Leave
Military Caregiver Leave

An employee is entitled to take up to 26 weeks of leave to care for a covered servicemember with a serious injury or illness incurred in the line of duty, while on active duty.

- Employee includes next of kin and parents of children over 18.

- Covered servicemember is defined as a current member of the Armed Forces, National Guard or Reserves who is on the temporary disability retired list, in outpatient status.

- The leave year is based on a single 12-month period, beginning the first day the employee takes leave.
Military Caregiver Certification

- Employers may request certification from authorized health care providers.
- The employer can require confirmation of the employee’s relationship with the servicemember.
Military Caregiver Certification

Certification may also include:

- Details about the medical condition.
- Whether the condition occurred in the line of duty.
- When the condition occurred.
- The probable duration of the condition.
- The amount of time the servicemember will require care.
Military Caregiver Certification Form

- Recertification is not permitted.
- Second/Third opinions are not permitted.
An employee is entitled to take up to 12 weeks of leave for a “qualifying exigency” arising out of the fact that the employee’s spouse, child, or parent has been called up to active duty in support of a contingency operation.

Does not apply to family members of military members of the regular armed forces – only the National Guard or Reserves.
Qualifying Exigency Leave

A qualifying exigency includes:

<table>
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<tr>
<th>Short-notice deployment</th>
<th>Counseling</th>
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<tr>
<td>Military events and related activities</td>
<td>Rest and recuperation</td>
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<tr>
<td>Childcare and school activities</td>
<td>Post-deployment activities</td>
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<tr>
<td>Financial and legal arrangements</td>
<td>Activities agreed upon by employer and employee</td>
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An employer can request certification for Qualifying Exigency Leave.

An employer may only request a military member’s active duty orders once.
Qualifying Exigency Certification

Certification may also include:

- Copies of the military member’s duty orders or other military documentation.
- Facts regarding the exigency.
- Dates of the military servicemember’s active-duty service.
- Date of commencement of the exigency.
- Where the leave is for a meeting with a third party, detailed information about the third party and the nature of the meeting.
- Where the request is for intermittent leave, the beginning and end dates and frequency or duration of the qualifying exigency.
Employer Notices – Overview

Employers Must Meet the Following Notice Requirements:

- Post an FMLA poster.
- Give individual notice (usually via employee handbooks).
- Provide eligibility notices.
- Provide written notice detailing employee rights and responsibilities.
- Provide designation of leave notices.
FMLA posters are generally posted in break rooms, usually on bulletin boards used for other required postings. Even employers that are not typically covered by the FMLA may need to post the FMLA requirements.
Employer Notices – Handbooks

- Covered employers must provide eligible employees with individual FMLA notices.
- Employers may meet this requirement by placing an FMLA policy in their employee handbooks and ensuring each employee receives a copy of such handbooks.
- Old FMLA policies will require updating.
Employer Notices -- Eligibility

Eligibility Notices:

- Must be given within 5 days of an FMLA request or other form of notice.
- Must state whether or not the employee is eligible for leave.
- Eligibility is determined on the date leave commences.
- If the employee is not eligible, the notice must provide a reason for ineligibility.
- An eligibility notice is required any time circumstances affecting eligibility change during a leave year.
A Notice of Rights and Responsibilities must be given with every eligibility notice.

The notice must detail employee obligations and explain the consequences of the failure to meet such obligations.

Notices must be in a language understood by the employee.
Rights and Responsibilities Notices Must Include the Following:

- Notice that leave may count against the employee’s annual FMLA leave entitlement.
- The applicable 12-Month period for FMLA entitlement.
- Any certification requirements.
- The employee’s status as a key employee and its potential consequences.
- The employee’s rights to maintain health benefits and job restoration.
Rights and Responsibilities Notices Must Include the Following:

- Any consequences for the failure to provide the required certification.
- The employee’s right or requirement to substitute paid leave for unpaid leave.
- Any requirements to make premium payments to maintain health benefits.
- Any consequences for the failure to make required premium payments or for the failure to return to work.
**Employer Notices – Designation**

- Designation notices must be provided within 5 days of receiving enough information to determine whether the requested leave is FMLA qualifying.

- Usually such notice is provided 5 days after receiving a certification form.
Employer Notices – Designation

Designation Notices Must Include:

- Whether or not the leave qualifies under the FMLA;
- The anticipated time to be counted against the employee’s FMLA leave entitlement;
- Whether the employer requires substitution or use of paid leave;
- Whether the employee has requested to use paid leave; and
- Whether a Fitness-For-Duty Certificate will be required prior to job restoration.
Penalties for failing to provide the required notices may include:

- A finding of FMLA interference;
- Payment of lost wages and benefits;
- Liquidated damages;
- Attorney’s fees; and/or
- Equitable relief (i.e., reinstatement, promotion, order to allow FMLA leave).
Employee Notices – Timing

- When leave is foreseeable, employees must give 30-days advance notice.

- When leave is not foreseeable, employees must give as much notice as is practicable under the circumstances.

- One to two business days generally is possible.

- Employers can require employees to follow their normal call-in and leave procedures.

- Leave may be delayed (and in limited circumstances denied) for failure to provide proper notice.
Employees must provide sufficient information for an employer to *reasonably* determine whether FMLA may apply.

Employees do not have to expressly reference the FMLA the first time they identify a qualifying event.

Calling in “sick” does not generally trigger FMLA rights.

Employees must respond to questions designed to determine whether the FMLA applies.

Failure to respond to reasonable inquiries may be reason to deny FMLA leave.
Medical Certification

- Employers may request medical certification if the employee was given prior written notice that such certification may be required.

- The employer has 5 business days to request certification.

- The employee has 15 calendar days to provide the requested certification.
Complete and Sufficient Certification

- An employer must notify the employee in writing if the certification is “incomplete” or “insufficient.”

- The employee has seven calendar days to cure any deficiency.
Medical Certification Content

- The medical professional’s specialty or type of practice.
- A statement of appropriate medical facts.
- Certification that intermittent or reduced-schedule leave is medically necessary.
- Information that is sufficient to establish that the employee is unable to perform an essential function of the employee’s job.
- An estimate as to the frequency and duration of intermittent or reduced-schedule leave.
An employer may now directly contact an employee’s health care provider for the purpose of “authenticating” or “clarifying” a medical certification – without first obtaining the employee’s permission.

A health care provider, HR professional, leave administrator, or management official may contact the health care provider on the employer’s behalf.

The employee’s direct supervisor cannot contact the health care provider.
Second and Third Opinions

- If an employer has reason to doubt the validity of a certification, it may require a second opinion at the employer’s expense.

- If the opinions of the two provider’s differ, a third opinion may be obtained.

- An employee must authorize the release of relevant medical information to the physician providing second/third opinions.
Recertification

- The 30-day rule
- The 6-month rule
- The annual rule
- The exceptions
  - The circumstances have changed significantly.
  - The employer receives information that casts doubt on the stated reasons for the leave.
Fitness-for-Duty Recertification

- In the designation of leave notice, employers must notify employees if they will be required to submit a fitness-for-duty certification prior to reinstatement.

- The health care provider may be required to verify that the employee is able to perform the “essential functions” of the job.

- Employees on intermittent or reduced leave may be asked to provide a fitness-for-duty certification every 30 days only if reasonable safety concerns exist regarding the employee’s ability to perform his/her duties.
Where two or more businesses exercise some control over an employee, they may be joint employers under the FMLA.

Joint-employer status is determined by looking at the entire relationship.

In joint-employer relationships the primary employer is responsible for giving the required FMLA notices, for providing FMLA leave, and for the maintenance of health benefits.

Employees jointly employed by two employers must be counted by both employers in determining coverage and employee eligibility under FMLA.
The regulations clarify joint-employer issues concerning Professional Employer Organizations ("PEO").

A PEO is a joint employer if, in conjunction with the economic realities of the situation, it has the right to hire, fire, assign, or direct and control the client’s employees.

A PEO is not a joint employer if it only performs administrative functions.

Even where a PEO is a joint employer, the client most commonly is the primary employer.
What you need to do

- Revise your certification or notice forms.
- Revise your employee handbooks.
- Provide updated FMLA notices and utilize the poster provided by the DOL.
Questions

We encourage you to submit questions.

Please click on the *Questions* Link at the top right of your screen to ask a question of our presenters.
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