

THE VANTAGE POINTE™

PROACTIVE PERSPECTIVES ON ISSUES AFFECTING THE WORKPLACE

The FMLA is New, Too

On November 17, 2008, the Department of Labor (“DOL”) issued final rules that change existing provisions and provide new rules regarding an employer’s obligations under the Family and Medical Leave Act of 1993 (“FMLA”). These new rules significantly impact how employers manage FMLA leave and also interpret the Military Family Leave Amendments enacted earlier this year. While the comprehensive document is intended to clarify the law regarding FMLA leave, it remains a complicated labyrinth and should be navigated with great care. This article targets some of the important changes that arise from these new rules, which go into effect on January 16, 2009.

Military Family Leave

On January 28, 2008, President Bush signed into law a revised version of the National Defense Authorization Act, which among other things, expanded the scope of the FMLA to grant two new leave entitlements to close family members of uniformed military personnel. These new leave entitlements are “Military Caregiver Leave”, which provides time off to care for injured servicemembers, and “Qualifying Exigency Leave”, which provides time off when a service member is called to active duty for a qualifying exigency.

Military Caregiver Leave

The Military Caregiver Leave amendment to FMLA provides FMLA-covered employees with 26 weeks of leave during a 12-month period to care for a “covered service member” who is recovering or recuperating from injury or illness suffered in the line of active duty or is otherwise in outpatient status, or is on the temporary retired list if an injury or illness prevents the service member from performing the duties required of someone in the same rank or grade.

The employee is considered eligible for this type of leave if he or she would be considered an eligible employee under FMLA. The employee/caregiver may be the spouse, parent or someone who stands *in loco parentis* to the covered servicemember, the child of any age (including stepchild,

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adopted child, foster child, legal ward, or for whom the covered service member stood *in loco parentis*) or “next of kin” of the injured servicemember. This employee need not be the only available family member to care for the covered servicemember. Thus, the definitions of “parent” and “child” are significantly broader and different than those used in typical FMLA leave situations.

As with other types of FMLA leave, the employee can elect, or the employer may require the employee, to substitute any accrued paid vacation, personal, or sick leave for any part of the 26-week period. An employee may not carry over any unused Military Caregiver Leave to any subsequent 12 month period. The amendment does not require an employer to provide paid sick or paid medical leave in any situation where the employer would not normally do so.

Consistent with other types of FMLA leave, an employee may elect to take the leave on an intermittent or reduced-schedule basis. In addition, if the employee qualifies for both FMLA leave and Military Caregiver Leave, the employer must first designate the leave as Military Caregiver Leave.

When an employee requests Military Caregiver Leave, the employer may require that such a request be supported by certification from the servicemember’s healthcare provider. Consistent with traditional FMLA requests, an employee may be denied leave if he or she fails to provide sufficient and complete information. An employer may authenticate or clarify the information included in a certification, but unlike in other FMLA circumstances, the employer may not request a second or third medical opinion regarding the servicemember’s medical condition.

Qualifying Exigency Leave

Another amendment requires employers to grant up to twelve (12) weeks of unpaid leave to an employee because of “any qualifying exigency” which arises because a spouse, son, or daughter, or parent is on active duty or has

been notified of an impending federal call or order to active duty in the Armed Forces in support of a “contingency operation.” State calls to active duty are not covered by this provision, unless the state call to active duty was ordered by the President. The broad terms defining “parent” and “child” for Military Caregiver Leave also are applicable to Qualifying Exigency Leave. Qualifying Exigency Leave does not apply to family of a Regular Armed Forces member.

The new rules provide an exhaustive list of applicable qualifying exigencies. Those include: 1) short-notice deployment; 2) military events and related activities; 3) childcare and school activities; 4) financial and legal arrangements; 5) counseling; 6) rest and recuperation; 7) post-deployment activities; and 8) additional activities that arise provided that the employer and employee agree that the leave is in support of an exigency and agree upon the timing and duration of such leave.

The employee must provide notice “as soon as practicable” regardless of how far in advance the exigency is foreseeable. Similar to Military Caregiver Leave, the employer may require certification of the qualifying exigency. Active duty orders or other military documentation must be accepted by the employer as complete and sufficient certification.

Changes to the “Traditional” FMLA

As you know, the FMLA applies to employers with 50 or more employees within a 75 mile radius. Since its passage in 1993, it had become the source of confusion to employers, employees and judges. Its provisions and rules became subject to numerous and often conflicting interpretations that further muddied the waters for employers. In an effort to reduce the bewilderment with the statute and its rules, the DOL’s new rules amended the law to change or clarify FMLA leave issues.

The 12 Month Employment Requirement

The new rules clarify FMLA eligibility when an employee’s period of employment did not occur in twelve consecutive months. The employment does not have to be in 12 consecutive months, but employers are permitted to refuse to consider employment prior to a continuous break of seven years in calculating an individual’s eligibility. The rules provide some limited exceptions to this general rule, specifically if 1) the break in service was due to the employee’s fulfillment of military obligations, or 2) the break is a period of approved absence or unpaid leave pursuant to a written agreement or collective bargaining agreement that demonstrates the intent of an employer to rehire the worker.

FMLA recordkeeping requirements mandate an employer

maintain employee records for three years. Therefore, if an employee relies on a period of employment that predates the employer’s records, the employee has the burden of proving prior employment sufficient to establish FMLA eligibility. The new rules provide that the eligibility determination is made at the time the requested leave begins. Thus, any leave granted prior to an employee becoming eligible is non-FMLA leave. This means that employers must be diligent to promptly calculate the eligibility date to ensure that subsequent leave is counted as FMLA leave.

Units of Leave – Intermittent/Reduced Leave

Employers frequently struggle with the administrative time keeping function related to employees on intermittent or reduced leave. The new rules allow an employer to institute a policy that dictates that at certain points in the day, different increments for leave can be used, provided that the employer does not account for FMLA leave in an increment larger than the shortest period used to account for other leave during that same period, provided it is one hour or less. This is especially useful in the beginning or end of the day, where an employer can require a greater period of leave to ensure the prompt arrival and to prevent early departure of employees.

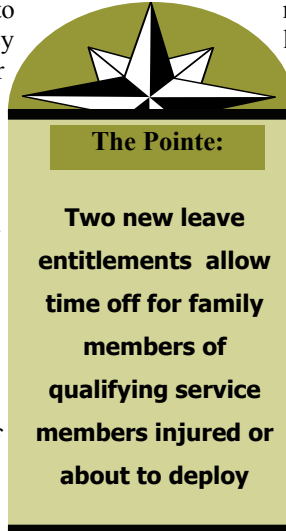
The rules also contain a provision that allows an employer to require intermittent leave to be taken in larger increments than one hour in situations where an employee is physically unable to commence or end work mid-way through a shift. The rules specifically mention flight attendants and railroad conductors, as well as laboratory employees who are unable to enter or leave a sealed “clean room.” In such instances, an employer may designate the entire period that the employee is forced to be absent as FMLA leave.

Calculation of Leave/Variable or Part-time Work/Overtime/Holidays

The new rules clarify that the employee’s actual work week is the basis of the leave entitlement. In other words, if an employee who normally works a 40 hour work week takes one day off, the employee would use 1/5 of a week of FMLA leave.

In a situation where the employee works a variable schedule on a week to week basis, the new rule is that the employer should calculate the 12 month weekly average of hours worked prior to the period in which the FMLA Leave is requested.

With regard to overtime, if an employee is normally required to work overtime, but cannot because of an FMLA-qualifying reason, the employee can be charged for FMLA leave for the overtime hours not worked. However, an employer cannot count against the employee’s leave any voluntary overtime



hours that the employee does not work due to a serious health condition.

If an employee is on FMLA leave for a period of greater than one week, any holiday that occurs during that week will be counted against the employee's leave entitlement. However, if the employee is using leave in increments of less than one week, the holiday will not count against the employee's leave entitlement unless the employee was scheduled to work on the holiday.

Substitution of Paid Leave/Procedural Requirements

According to the new rules, if an employee wishes to substitute paid sick or medical leave for FMLA leave, an employer now can enforce its policies regarding paid vacations or personal leave. An employee is only entitled to paid leave in lieu of FMLA leave if the employee qualifies for leave under the employer's paid leave policy and if the employee actually adheres to that policy for requesting and/or taking paid leave.

It is important to note that the employee is always entitled to unpaid FMLA leave (assuming eligibility requirements are met) even if the employee does not qualify for other leave or if the employee fails to adhere to the employer's policies regarding paid leave. Under the new rules, employees seeking FMLA leave may be required to fulfill FMLA requirements even if the employer has less stringent requirements for requesting other paid leave. In addition, an employer may waive the procedural requirements for taking any type of leave.

Health Benefits and Bonuses

The new rules permit an employer to allow an employee's group health insurance to lapse while the employee is on FMLA leave; however, the employer has the duty to reinstate the employee's policy when the employee returns from FMLA leave. The new rule states that if an employer fails to reinstate the employee's insurance coverage when the employee returns to work, the employer may be liable for benefits lost, actual monetary damages suffered by the loss, or equitable relief. In addition, the employer is permitted to deny perfect attendance bonuses and non-production incentives to an employee who takes FMLA leave, but only if the employer applies the identical policy to employees taking other types of leave.

Serious Health Condition

Much to the chagrin of employers and their attorneys, the DOL failed to substantially change or clarify the definition of a serious health condition. The term "Serious Health Condition" is defined as an "illness, injury, impairment or physical or mental condition that involves inpatient care or continuing treatment by a health-care provider." It should be noted that mental illness is considered a serious health condition.

The new rules make clear that a healthcare provider can be a phy-

sician's assistant but not a nurse. In addition, "continuing treatment" is defined as two visits to a health care provider that must occur within 30 days of the beginning of the period of incapacity unless extenuating circumstances exist. The new rules also defines a period of incapacity as "a period of more than three consecutive, *full* calendar days," adding the word "full."

Light Duty/Rights to Job Restoration

The new rules state that if an employee voluntarily accepts light duty instead of FMLA leave, the time spent on light duty does not count against the employee's FMLA entitlement nor does it impact the right to job restoration.

However, if an employee accepts light duty after the employee exhausts his 12 weeks of FMLA leave because the employee still cannot perform the essential functions of the job, the employee loses his right to be restored to his original job. In addition, an employee on light duty also loses the right to job restoration if he cannot perform the essential functions of the job at end of the twelve month period used to calculate FMLA eligibility.

Releases of FMLA Claims

Under the new rules, an employee may waive claims to past FMLA violations without DOL or court supervision (e.g., by way of a severance agreement or release), but still cannot waive prospective claims.

Employer Notice Requirements

An employer must provide general notice about FMLA (poster, handbook, new general notice form) within five days of hire. This notice should be available to applicants as well. Formerly, employers were required to provide this notice within two days of hire, but the new rules have extended the time to five days.

Under the new rules, employers have five days from the time the employee requests leave (or that the employer becomes aware that the leave may be FMLA qualifying) to inform the employee of their eligibility to take FMLA leave. If the employer deems the employee ineligible for FMLA leave, the employer must specify at least one of the reasons for ineligibility.

In addition, the DOL requires a new notice called the "Rights & Responsibilities Notice" which must be given to the employee at the same time as the above-mentioned eligibility notice. This notice contains the expectations and obligations of the employee and consequences for noncompliance, as well as other important information regarding FMLA leave. This Rights and Responsibilities notice effectively eliminates the need for provisional FMLA leave because once the employee is given the eligibility and Rights and Responsibilities notices, the employer can delay FMLA designation until five days after the employer receives medical certification and other necessary information required to

make the designation. If the employer fails to provide adequate notice of eligibility under FMLA, the aggrieved employee can only recover damages upon a showing of individualized harm as a result of the employer's failure to provide adequate notice. In such instances, the employer can be liable for lost compensation, lost benefits, reinstatement, or promotion.

Fitness for Duty Certifications

If the employer requires a fitness for duty certification for the employee to return to work, the designation notice must say so unless such a requirement is stated in the employee handbook. In that case, the employer can notify the employee of this requirement verbally. Such a fitness for duty certification must address the employee's ability to perform essential job functions which must also be listed in the designation notice. If the employer follows these notice requirements, but the employee fails to provide the certification, the employee loses his right to reinstatement under the law unless the employee has requested additional FMLA qualifying leave.

In addition, employers are still prohibited from requesting fitness for duty certifications after each intermittent leave of absence. However, under the new rules, the employer is permitted to require a fitness for duty certification every 30 days if the employee has used intermittent leave during that period and reasonable safety concerns exist. Finally, an employer may not terminate an employee while awaiting the employee's production of a fitness for duty certification.

Employee Notice Requirements

The employee must make a reasonable effort to schedule leave so as not to unduly disrupt employer's business. When the need for FMLA leave is foreseeable, the employee must provide the employer at least 30 days of notice unless it is impracticable. If the employee fails to provide such notice, the employer can ask for an explanation. In such a situation, the employer may delay the leave in an amount proportional to the days of notice required.

At a minimum, employees are required to give the employer verbal notification sufficient to make the employer aware of the need for FMLA leave and how long such leave is necessary. An employee seeking leave for the first time need not ask for it by name, but employees who have previously utilized FMLA leave must make a specific reference to a qualifying reason for the leave or the need for FMLA leave. In any case, if the employer is unclear as to whether the leave may be FMLA qualifying, the employer may conduct a reasonable and limited inquiry of the employee in order to gather sufficient information to make a determination. If the employee fails to respond to the employer's inquiry, the employer may deny the request for FMLA

leave.

Medical Certifications

The new rules regarding medical certifications permit an employer to directly contact an employee's healthcare provider for authentication or clarification of certification provided. The employer cannot request information beyond that required by the certification form, the limits of which are dictated by DOL. The employer can contact the healthcare provider by using another healthcare provider, HR representative, leave administrator, or management official. However, the new rules expressly state that the employee's direct supervisor cannot contact the employee's healthcare provider.

If the employer believes the information provided is deficient, the employer must give the employee an opportunity to cure any deficiencies prior to contacting the healthcare provider. If the employee refuses to cure the deficiency or otherwise grant the employer permission to speak to the healthcare provider, the employer may deny the employee's FMLA leave request. The employer may also deny the leave request when an employee refuses to provide medical records to the healthcare provider for the preparation of a second or third opinion. The employer now has five days, instead of two, to provide an employee with a requested copy of a second or third opinion.

Recertification

Recertification

The new rules amend recertification requirements, allowing the employer to require recertification every 6 months in connection with an FMLA absence. In addition, an employer can request recertification less than thirty days from the original certification if any employee seeks an extension of leave during that period. An employer may also provide the employee's healthcare provider with the employee's attendance records to determine whether the employee's need for leave is consistent with the employee's actual serious health condition.

Conclusion

The new rules are comprehensive and far-reaching, and significantly impact the way employers must manage employee leave under the FMLA. Employers should prepare updated employee and supervisory handbooks with revised leave policies and procedures to ensure technical compliance with FMLA and provide training to managers who are on the front line of ensuring FMLA compliance. Should you have any questions regarding any FMLA leave issues, please do not hesitate to contact any of Vantage's employment attorneys or HR consultants.

