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California Law Update

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AT LONG LAST, THE FAMILY AND MEDICAL LEAVE ACT IS REVISED

The Department of Labor ("DOL") issued its final regulations interpreting and revising the Family and Medical Leave Act ("FMLA"). Commencing *January 16, 2009*, the revised regulations make a number of notable changes to the existing, original regulations that date back to 1995. The new regulations are over seven hundred and fifty pages in length, and thus, the following will highlight the more significant changes to FMLA and the Military Family Leave. Though quite lengthy, it is a necessary read for all employers.

Who Is Covered Under FMLA and What Are An Employee's Rights Under FMLA?

FMLA was designed to balance the demands of the workplace with the needs of an employee's family. FMLA applies to employers who employ fifty or more employees either at the requesting employee's jobsite or within seventy-five mile radius of the employee's jobsite. Eligible employees under FMLA are employees who work for a covered employer for at least twelve months and worked for the employer for at least 1,250 hours in the past twelve months.

If FMLA applies, an employer must provide twelve weeks of unpaid leave per year to 1) care for an employee's newborn child (or a child adopted by or placed for adoption with the employee); 2) to care for a child, spouse, or parent with a serious health condition, and 3) to obtain treatment and recover from an employee's own serious health condition if it affects his/her ability to do their job. Covered employers must also provide eligible employees up to twelve weeks of unpaid leave in a one-year period for an "exigency" related to active duty service by the employee's immediate family member. Eligible employees may also take up to twenty-six (26) weeks during the employee's employment for the care of a spouse, son, daughter, parent or next of kin who is a member of the armed forces and is undergoing medical treatment or is medically unfit to perform military duties due to an injury or illness incurred while on active duty.

Revisions To The FMLA Regulations:

The revisions to FMLA provide employers with new tools to administer and determine eligibility under FMLA more efficiently. Although employers retain more latitude to obtain information from employees and health care providers, employers have new obligations to inform employees of their rights and responsibilities under FMLA.

- Serious Health Condition: The final regulations maintain the same six definitions of "serious health condition." However, the new rules provide that for a serious health condition involving continuing treatment by a health care provider for incapacity of more than three consecutive days, an employee must receive two treatments by a health care provider. The first visit must occur within seven days of the period of incapacity and the second visit within thirty days. Additionally, to qualify as a chronic serious health condition, the condition must require at least two visits to a health care provider per year.

- Eligible Employees Under FMLA: The new regulations continue to require that an employee be employed by an employer for at least twelve months and work 1,250 hours in the twelve months preceding the request for leave. Pursuant to the new regulations, the twelve months of employment need not be consecutive, provided that the break in service is not more than seven years.

- Employer Notice Requirements. The new regulations change the manner in which employers must provide notice to employees. Employers must give employees four kinds of notice, generally within five business days in the absence of extenuating circumstances:

  ◊ General Notice- Employers must provide employees with the general FMLA notice in their handbooks or other written materials. Electronic posting of the general notice of FMLA rights is sufficient provided all employees and applicants have access to the electronic posting. The information must be given in other languages if a "significant percentage" of employees are non-English speaking. If an employer does not have a handbook or written materials, it must advise employees of FMLA rights upon hire, as opposed to once a year. The new regulations include a new model general notice that employers may use.

  ◊ Eligibility Notice To Employees, "Rights and Responsibilities"- Upon receiving notice of an employee's request for leave, an employer now has five business days to notify the employee of his/her eligibility for leave absent extenuating circumstances. If the employer determines the employee is not eligible, the notice must state at least one reason why, e.g., lack of twelve months service or not employed at a site with fifty or more employees within seventy-five miles. Concurrently, the employer must provide a notice of Rights and Responsibilities, which includes but is not limited to such information as furnishing medical certification and consequences of not doing so, right to substitute paid leave, and the requirement of paying health insurance premiums.

  ◊ Designation Notice to Employees- Within five business days, an employer should obtain sufficient information to determine and give notice to the employee whether leave is being taken for a FMLA qualifying purpose. If an employer requires a fitness-for-duty certification to return to work, it must provide notice. The employer must also provide a list of essential job functions if the employer requires certification of the employee's ability to perform the essential job functions of his/her job upon return from leave.

  ◊ Retroactive Designation- The new regulations allow retroactive notice if an employer fails to provide timely notice and the delay does not cause an employee injury or harm. In situations where leave would qualify under FMLA, an employee and employer can mutually agree that the leave be retroactively designated as FMLA protected leave.

  ◊ Time Allotted For Notice- Employees must continue to provide at least thirty days notice if the need for leave is foreseeable. If thirty days is not possible, i.e., the need for leave is not foreseeable, an employee must provide notice as soon as practicable. The new regulations give guidance on the term "as soon as practicable" and generally mean the same or the next business day. If an employee fails to provide timely notice without reasonable excuse, or fails to follow the employer's usual notice and procedural requirements (as long as the rules are not more stringent than the FMLA requirements), the regulations now permit the employer to delay or deny FMLA leave.

- Employee Notice Requirements:

  ◊ Content Of Employee Notice- Employees must now provide sufficient information to allow an employer to determine whether the requested leave is FMLA-qualifying. If an employee fails and/or refuses to respond to an employer's reasonable inquiry for further information on the issue, leave may be denied.

- Medical Certification:

  ◊ Timing- Employers may request medical certification within five days after the employee gives notice of the need for leave or in unforeseeable circumstances on the date the employee begins leave. Employees must submit the completed certification form within fifteen calendar days unless it is not practicable. An employer must advise the employee in writing of the additional information necessary to complete the medical certification and must give an employee at least seven days to cure incomplete and/or insufficient certification forms. Employers may deny leave if the employee fails to cure the deficiency.

  ◊ Content of Certification- The DOL created separate medical certification forms that distinguish between leave for an employee's own serious health condition and to care for a family member with a serious health condition. The new regulations also mandate that the medical certification for an employee's own serious medical condition must include the health care provider's facts regarding the employee's medical condition, and whether a reduced schedule leave is medically necessary.

  ◊ Authentication/Clarification- An employer's representative, but not the employee's direct supervisor, may now contact an employee's health care provider directly to authenticate the certification form or to obtain clarification provided that the employee has been given the opportunity to cure a deficient or incomplete certification.

- Light-Duty Work: An employee's right to FMLA leave and job reinstatement are not affected by light-duty assignments. Thus, time spent performing "light duty" work does not count against an employee's FMLA leave entitlement, and the employee's right to reinstatement is tolled while he performs light duty (or until the end of the applicable twelve-month FMLA leave year).

- Fitness-For-Duty Certification: Employers may request that the certification specifically address the employee's ability to perform the essential functions of her job. Employers may also demand fitness-for-duty certification from employees on intermittent leave when there are reasonable safety concerns.

- Bonuses: An employer may now disqualify an employee from a bonus or other payment based on achievement of a specified job-related performance goal (such as attendance or hours worked) where the employee has not met the goal due to FMLA leave. The employer must apply this rule in a nondiscriminatory manner.

- Release of Past FMLA Claims: Employees may now settle and release *past* actual or potential FMLA claims without approval of the DOL or a court. Prospective waivers of FMLA rights continue to be prohibited.

Military Family Leave Amendments:

The FMLA was amended earlier this year to provide leave to employees who care for military service members with a serious injury or illness and due to qualifying exigencies relating to military service. The issues clarified and defined are as follows:

- "Qualifying Exigency" Clarified: The new regulations define this term to include the following: 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; 8) additional activities to address other events which arise out of the covered military member's active duty or call to active duty status, provided the employer and employee agree such leave qualifies as "exigency" and agree to the timing and duration of the leave.

- "Single Twelve-Month Period" Defined: The twelve-month period for military caregiver leave commences when the employee first uses this type of leave, regardless of how the employer otherwise measures the employee's entitlement to FMLA for other qualifying reasons.

- "Next of Kin" Designation: The DOL prioritized blood relatives who may be considered "next of kin." In addition, covered servicemembers may now designate in writing another blood relative who may provide care under FMLA. If a covered servicemember does not make such designation, all family members with the closest level of relationship may take FMLA leave to provide care, either consecutively or simultaneously.

- Overlap of Leaves: Leave that qualifies as both Military Leave and leave to care for a family member's serious health condition during the "single twelve-month period" cannot be designated and counted as both types of leave.

- Medical Certification for Caregiver: The medical certification requirements for leave to care for a covered servicemember are different from the requirements for taking leave to care for a family member with a serious health condition.

- Notice of Qualifying Exigency Leave: Employees need not provide notice to their employers when they learn of a covered family member's call to active duty or active duty status. An employee's obligation to provide notice is triggered by the employee's need to take leave due to a qualifying exigency. If the exigency is foreseeable, an employee must provide reasonable and practicable notice.

As stated above, the preceding is a brief summary of some of the many changes contained in the FMLA regulations. For specific questions regarding FMLA, we recommend that you contact an employment attorney. We also suggest that all employers conduct a thorough audit of their employee handbook and/or policies and procedures regarding FMLA leave. Burnham Brown's employment attorneys are able to discuss these issues, in addition to providing assistance in re-drafting and implementing sound employment policies and procedures.

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