

# Employment Edge 90th Edition - Final FMLA Regulations Issued by the Department of Labor

November 18, 2008

Final, revised, regulations interpreting and guiding enforcement of the Family and Medical Leave Act (FMLA), were formally issued by the U.S. Department of Labor on Monday, November 17, 2008. The publication of these final, revised rules completes a process that extended more than two years and involved extensive commentary and public input on proposed regulations that were posted by the DOL this past February.

The new regulations, which are effective on January 16, 2009, are intended to incorporate both changes in the law-the new leave entitlements for military families, for instance-and adjustments deemed appropriate to address interpretation of the FMLA in some federal courts.

The extent to which the new, final regulations are different from the proposed regulations posted last February is not yet clear. Lawyers and HR professionals will be pouring over the new regulations for days and weeks to come. Still, there are a number of things that it is already clear the final regulations address:

- Definitions applicable to the new leave entitlement for military families, including the much anticipated definition of a "qualifying exigency" sufficient to trigger leave rights. A qualifying exigency includes: (1) a short-notice deployment; (2) military events and related activities; (3) child care and school arrangements; (4) financial and legal arrangements; (5) counseling; (6) rest and recuperation; (7) post-deployment activities; and (8) additional activities where the employer and the employee agree to the leave
- The DOL's position that an individual may waive FMLA rights without court or DOL approval (a position rejected by at least one federal appeals court).
- The definition of a "serious health condition" based on more than three consecutive days of incapacity coupled with two visits to a health care provider by clarifying that both visits must be within 30 days of the incapacity
- The definition of a "serious health condition" based on a claimed chronic condition coupled with visits to a health care provider by clarifying that there must be at least two visits per year
- Authority for employers to require, in most situations, that employees follow the usual and customary call-in procedures for reporting an absence
- Authority for HR professionals, in some situations and with specific restrictions, to contact a health care provider to clarify a medical certification



- The modest extension of certain time periods in which an employer must provide a variety of notices

The employment law attorneys of Gray Plant Mooty will be reviewing the new, final FMLA regulations in more detail over the coming days and weeks and hope to have more information available soon. All employers subject to the FMLA are encouraged to watch for updated information about these new rules and to contemplate the need to update existing FMLA leave policies and employee handbook provisions accordingly.

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