

Brunini Employment and Labor News

THE REVISIONS {EFFECTIVE JANUARY 16, 2009} TO THE FAMILY MEDICAL LEAVE ACT RESULT IN THE NEED FOR IMMEDIATE CHANGES TO EMPLOYMENT HANDBOOKS, POLICIES STATEMENTS, AND FORMS

The Family Medical Leave Act ("FMLA") requires employers with 50 or more employees working within a 75 mile radius to permit "eligible employees" (1250 working hours and 12 months of work) to take job and benefits protected leave for up to twelve weeks for qualified reasons. Before the most recent amendments to the FMLA, a qualified employee could take up to twelve weeks of job protected leave for a serious health condition, or to care for a spouse, child, or parent with a serious health condition, or for the birth, adoption or foster placement of a child.

Most prominent of the revisions is that there are now two types of leave for covered armed service members (including active duty, National Guard, reserves and retirees) and their family members: (1) a "qualifying exigency" leave and (2) leave to care for a covered service member. Leave for a "qualifying exigency" covers the employee as the member of the armed services and/or spouses, parents and children of members of the armed services who are on active duty, or are notified that they will be called for active duty in support of a contingency operation. The new regulations have a broad definition of "qualifying exigency" that covers short-notice deployment, military events, ceremonies, spousal support groups, child care and school activities, financial and legal arrangements, counseling, rest and recuperation, and post-deployment activities.

Employees who are members of a family (spouse, son, daughter, parent or next of kin) containing members of the armed service are also entitled to take up to 26 weeks of leave in any single twelve month period to care for the service member in case of serious injury. Employees can not "double dip" and are only entitled to a total of 26 weeks of FMLA leave during any qualifying twelve month period.

As with other kinds of FMLA leave, an employer may require the employee to first use accrued paid leave, whether personal or sick leave, for leave provided under the new amendments. A husband and wife employed by the same employer are limited to a shared 26 workweeks in a twelve month period. The employer may request documentation or certification of the qualifying exigency prior to granting the leave.

The new regulations also require employers to provide **new notices and forms** to employees. The new forms are significantly different from the old forms. Among these are a general notice about FMLA that should be posted either as a poster in the workplace or in the employee handbook or as a

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separate document when an employee is hired. The first notice may be provided in electronic format. The new forms include an eligibility notice, a rights and responsibilities notice, and a designation notice. These forms may be downloaded for free from the Department of Labor (“DOL”) website, www.dol.gov.html. The new regulations also provide four revised certification forms. These forms are also available on the DOL and can be downloaded free of charge. Unlike the old certification form which required an employee’s health care provider to determine whether a serious health condition existed, the new forms place the burden on the employer to determine whether the condition qualifies for leave.

In addition to using new certification and eligibility forms, employers should review and revise their FMLA leave policy statements contained in handbooks and policy statements so that they are consistent with revised regulations. Employers who receive requests for FMLA leave from employees should consult with their legal counsel if they have any questions as to the employee’s eligibility or qualification for FMLA leave.

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