



The Legal Aspect

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Family Medical Leave Act Changes New Regulations Clarify Family Medical Leave Act Intermittent Leave

► Recertification for Long-Term Health Conditions Requiring Intermittent Leave

New regulations for FMLA provide that employers cannot require recertification for “chronic serious health conditions” more often than every six months. An exception to this is where the employer has information that casts doubt on the employee’s stated reason for absence. A chronic serious health condition is one that is likely to be permanent or last for over six months necessitating intermittent leave or a reduced schedule. However, to qualify as an employee with a “chronic serious health condition” necessitating intermittent leave, an employee must make at least two visits to a health care provider per year. 29 C.F.R. § 825.308(b).

► Intermittent FMLA Leave for Planned Medical Treatment

Employees using intermittent FMLA Leave for planned medical treatment must make “a reasonable effort” to schedule their leave so that it does not unduly disrupt an employer’s operation. 29 C.F.R. § 825.203.

► Fitness-For-Duty Certification After Intermittent Leave

Certification for return to work after intermittent leave is governed by the terms of a Collective Bargaining Agreement. If it is not covered by the terms of a CBA, then a certification of fitness for duty to return to work must be in accord with the employer’s uniformly applied policy or practice for all similarly situated employees (in the same occupation with the same serious health condition). However, the employer cannot request a fitness for return to duty for intermittent leave more often than once every 30 days in conjunction with an FMLA absence, and only if reasonable safety concerns exist regarding the employee’s ability to perform his job. Reasonable safety concerns means “a reasonable belief of significant risk of harm to the individual employee or others.” The employer must also notify the employee at the time that the FMLA Leave is certified that a fitness for return to duty examination will be required for the employee’s return to work. 29 C.F.R. § 825.302(a) thru (d).

► Call-In Procedure for FMLA Leave

Employees using FMLA Leave must follow the employer’s usual call-in procedures for reporting an absence unless unusual circumstances exist.

Other Notable Amendments to the FMLA Regulations

► If an employer deems a medical certification to be deficient, the employer must specify in writing what information is lacking and give the employee seven calendar days to cure the deficiency.

► Clarifies when an employee must visit a health care provider for a serious health condition which incapacitates the

employee for more than three consecutive days. (These clarifications do not apply to intermittent leave for chronic serious health conditions.) A serious health condition includes one where the employee is incapacitated for more than three consecutive days and **also requires either:**

1. Two visits to a health care provider, where the visit must occur **within 7 days** of the first day of incapacity (unless there are extenuating circumstances) and the second visit must occur **within 30 days** of the first day of incapacity, or
2. At least one visit to a health care provider **within 7 days** of the first day of incapacity which results in a regimen of continuing treatment under the supervision of a health care provider.

The New Military Family Leave Entitlements

Two new military leave programs were created by the National Defense Authorization Act (“NDAA”) of 2008. The NDAA amended the FMLA to expand leave opportunities for members of the armed forces and their relatives in two primary ways: (1) military caregiver leave and (2) qualifying exigency leave.

Military Caregiver Leave: The son, daughter, spouse, parent or next of kin of a covered service member may take up to 26 workweeks of leave in a single 12-month period to care for a covered service member with a serious illness or injury incurred in the line of duty while on active duty. This leave may also be taken intermittently if medically necessary. A “covered service member” is a member of the armed forces who is undergoing medical treatment, recuperation or therapy, is otherwise on outpatient status or is otherwise on the temporary disability retired list, but does not include members on the permanent disability list and only includes current members of the armed forces, not retired members. Military caregiver leave is tracked in a 12-month period separate from any other 12-month period of FMLA Leave. However, this provision does not expand or alter the 12-week-maximum of leave allowable for other FMLA-qualifying reasons, and any use of those 12 weeks is subtracted from the 26 weeks of leave to care for a family member under this provision.

Exigency Leave: This allows an employee to take up to 12 workweeks of FMLA job-protected leave for a “qualifying exigency” arising out of that employee’s spouse, son, daughter, parent or next-of-kin who is on active duty or has been notified of an impending call to active duty in the Armed Forces in support of a contingency operation. This leave may also be taken intermittently. The new regulations broadly define a “qualifying exigency” to include the following circumstances: (1) Short-term notice deployment (up to seven days); (2) Military events and related activities; (3) Childcare and school activities; (4) Financial and legal arrangements; (5) Counseling; (6) Rest and recuperation (up to five days); (7) Post-deployment activities (90 days); and (8) Additional activities not encompassed in other categories, but agreed to by the employer and employee. ■

A knowledge of legal rights remains, as a matter of common sense, a first step in protecting interests of your Local and your members. Always consult with Local Union counsel if and as information, guidance or other advice is needed on subjects of interest and concern.