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### Recent Major Changes to the Family Medical Leave Act (“FMLA”) Regulations

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## RECENT MAJOR CHANGES TO THE FAMILY MEDICAL LEAVE ACT (“FMLA”) REGULATIONS

The United States Department of Labor has finalized new regulations which affect interpretation of the Family Medical Leave Act (“FMLA”). These changes became effective January 16, 2009. Lozano Smith has prepared this bulletin to explain the most significant changes, which are summarized below. Because the revisions are extensive, however, this bulletin cannot cover all of them. If you have specific questions regarding FMLA coverage for your employees, please contact one of our seven offices statewide.

### Employee Eligibility

The new regulations do not change the basic requirement that to be eligible for FMLA protection, an employee must have worked with an employer for at least twelve months and for at least 1,250 hours in the last twelve months. However, the new regulations do affect the measurement of the twelve-month requirement. Employers generally do not need to count work performed before a break in service lasting seven years or more, unless the reason for the break in service is due to military service or a written agreement, including a collective bargaining agreement, indicating the employer’s agreement to rehire the employee after a break in service. (29 C.F.R. § 825.110(b).)

The calculation of the hourly requirement has also changed so that if an employee would have worked the 1,250 hours to qualify but did not because of military service, the employee would remain eligible for FMLA. Additionally, the new regulations require that an employer who does not keep track of hours must prove that the employee did not work the 1,250 hours. The regulations cite the example of a teacher who may work at home or outside of instructional hours, which would require the employer to prove that the teacher did not in fact work the 1,250 hours to be eligible. (29 C.F.R. § 825.110(c).)

The new regulations also clarify that an employee may become eligible for FMLA leave during a non-FMLA leave. (29 C.F.R. § 825.110(d).)

### Serious Health Condition

The new regulations do not change the six familiar definitions of “serious health condition”, but do clarify some of the definitions.

The new regulations clarify that a serious health condition is one that causes incapacity for more than three full days and requires either (a) two “in-person” visits with a health care provider “within a 30-day period” occurring within seven days of the onset of leave, or (b) one “in-person” visit with a regimen of continuing treatment which occurs within seven days of the onset

of leave. (29 C.F.R. § 825.115(a)(3).) In addition, the definition of “chronic condition,” was clarified to require employees to visit a health care provider at least twice per year to qualify as having a “chronic condition”. (29 C.F.R. § 825.115(c)(1).)

### Health Care Provider

The new regulations add “physician’s assistants” to the list of health care providers eligible to prepare FMLA medical certifications and treat employees. (29 C.F.R. § 825.125(b)(2).)

### Intermittent Leave

Intermittent leave is allowable under FMLA. The new regulations provide that an employee taking intermittent leave “must make a reasonable effort” to schedule treatments so as not to “disrupt unduly” the employer’s operations. (29 C.F.R. § 825.203.)

### Holidays

The new regulations provide for the calculation of FMLA during a holiday. If the employee takes a week of FMLA leave and a holiday occurs during the week, the employee has still exhausted a week of leave. However, if the employee is using FMLA leave in increments or for less than a week, then the holiday will not count toward the FMLA leave. (29 C.F.R. § 825.200(h).)

### Light Duty

The new regulation allows for an employee to refuse a “light duty job assignment” and still take FMLA leave. (29 C.F.R. § 825.207(e).)

### Waiver of Rights

Previously, the regulations stated that “[e]mployees cannot waive, nor may employers induce employees to waive, their rights under FMLA.” Some courts interpreted this language to prohibit settlement agreements without court approval. The new regulations include a provision permitting “the settlement or release of FMLA claims by employees based on past employer conduct without the approval of the Department of Labor or a court.” (29 C.F.R. § 825.220(d).)

### Employer Notices

The new regulations outline four separate types of FMLA notices that must be provided by employers to employees:

(1) “general notice”, which includes placement of a poster listing employees’ FMLA rights, and a requirement that new employees receive written confirmation of their rights upon hiring in the form of an employee handbook or other written document (29 C.F.R. § 825.300(a));

(2) “eligibility notice”, which applies when an employee first requests FMLA leave: the employer must notify the employee, either orally or in writing, of their eligibility status within five business days. If the employee is not eligible the employer must articulate “at least one reason” why the employee is not eligible. No eligibility notice is required after responding to the first request, unless the employee’s eligibility status changes. (29 C.F.R. § 825.300(b));

(3) “rights and responsibilities notice”, which must be provided in writing, and include: (1) an explanation that leave granted under the FMLA leave will be deducted from the employee’s twelve-week allowance, (2) outline the requirements for employees to submit medical certifications and the consequences if the employee does not, (3) any requirements by the employer regarding the requirement or ability to substitute paid leave, (4) any requirements for the maintenance of health benefits during FMLA leave, (5) key employee status and the potential consequences that restoration could be denied, (6) the employee’s rights to maintenance of benefits and job restoration following leave, and (7) the employee’s potential liability for unpaid health insurance premiums if the employee fails to return to work following leave. (29 C.F.R. § 825.300(c)); and

(4) “designation notice”, which must be provided by employers in writing within five days after the employer has sufficient information to make a determination of whether the leave qualifies under the FMLA or why it does not. If leave is granted, the designation notice must specify the amount of leave allowed in hours, days or weeks and must include any requirements for medical certification that may be required before an employee is able to return to work. If the leave is intermittent, the employer must provide subsequent designation notices upon the employee’s request, but is not required to provide them more often than every 30 days. (29 C.F.R. § 825.300(d).)

### Employee Notification

The new regulations clarify and comply with recent court decisions holding that an employee is not required to mention the FMLA by name when “an employee seeks leave for the first time for an FMLA qualifying reason.” However, an employee simply calling in “sick” does not affirmatively trigger the duty for the employer to make an FMLA determination. Subsequent requests for FMLA leave by the same employee for the same health condition require the employee to “specifically reference either the qualifying reason or the need for FMLA leave.” (29 C.F.R. § 825.303(b).)

### Usual and Customary Leave Procedures

The new regulations specify that even for unforeseeable leaves, it should be “practicable” for an employee to request leave “either the same day or the next business day.” (29 C.F.R. § 825.302(b).) Further, an employee must comply with the employer’s usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. (29 C.F.R. § 825.302(d).)

## Medical Certification

The new regulations include new approved medical certification forms, including separate forms for the serious health conditions of employees versus those of family members. The new regulations allow health care providers to include medical facts about diagnoses, symptoms, hospitalization, doctors' visits, prescription medication, referrals for evaluation or treatment (physical therapy, for example), or any other regimen of continuing treatment. (29 C.F.R. §§ 825.305 – 825.310.)

## Employer Contacts with Health Care Providers

The regulations also allow employers to contact physicians directly “[i]f an employee’s serious health condition may also be a disability within the meaning of the Americans with Disabilities Act,” so long as the more liberal restrictions of the ADA are observed. (29 C.F.R. § 825.306(d).)

The new regulations also permit an employer to make direct contact with the employee’s physician to seek “clarification and authentication” of medical certifications as long as the contact is made by “a health care provider, a human resources professional, a leave administrator, or a management official.” Importantly, “[u]nder no circumstances ... may the employee’s direct supervisor contact the employee’s health care provider.” The employee is not required to authorize the communication with their doctor, however, the employer may deny the designation of FMLA leave if the certification is unclear. (29 C.F.R. § 825.307(a).)

## Recertification

The new regulations change and clarify an employer’s right to obtain recertification for a serious health condition. If the medical certification indicates that the underlying condition will last more than 30 days, the employer may not request recertification until that minimum duration has lapsed. Employers may always require recertification every six months in connection with an absence, including a “lifetime condition”. (29 C.F.R. § 825.308.)

## Fitness-for-Duty Certification

The new regulations allow an employer to require a certification from a health care provider that the employee is fit to resume work following FMLA leave. The employer can provide the employee with a list of essential job duties together with the designation notice and require the health care provider to certify that the employee can perform the essential duties before returning to work. (29 C.F.R. § 825.312(b).)

With regard to intermittent leave, an employer is entitled to a certification of fitness to return to duty once every thirty days if “reasonable safety concerns” exist. (29 C.F.R. § 825.312(f).)

### Placement of Adopted Child and Pregnancy Leave

FMLA leave is available for the placement of adopted children and the birth of a child. The new regulations clarify that FMLA eligibility is not affected by the “source of the adopted child” and would therefore include time to travel to another country. (29 C.F.R. § 825.121(a)(1).)

Additionally, if a husband and wife eligible for FMLA work for the same employer, they are only entitled to a combined 12 weeks. (29 C.F.R. § 825.121(a)(3).)

### FMLA Leave for Military Families

FMLA leave is allowed for employees who need time to fulfill military duties or to care for family members in the military with a serious injury or illness incurred in the line of duty. The new regulations also allow families of National Guard and Reserve personnel on active duty to take FMLA to manage activities associated with their family members’ service, known as “qualifying exigencies.” The regulations define “qualifying exigencies” as: (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 to which the employer consents. (29 C.F.R. § 825.126(a).)

Employees who take leave for military reasons can take up to 26 weeks of leave in a 12-month period. This leave may be taken separately from other conventional forms of FMLA (i.e., for serious health conditions), so long as conventional FMLA leave does not exceed 12 weeks and the total leave does not exceed 26 weeks in the 12-month period.

### Special Provisions Applicable to School Employees

The regulations include special provisions that apply to public school boards and schools, but do not apply to colleges, universities, trade schools and preschools. For instructional employees of public schools who take intermittent leave or leave on a reduced leave schedule and the leave will last for more than 20 percent of the total number of work days, the employer may require the employee to choose either to: 1) take leave (not intermittent or reduced leave) for the period of treatment or care, but not greater than the duration of the planned treatment or care; or 2) transfer temporarily to an available alternative equivalent position, during the period of planned treatment or care.

Also, if an instructional employee begins leave more than five weeks before the end of a school term, the employer can require the employee to continue to take leave until the end of the term, if the leave will last at least three weeks and the employee would return during the last three weeks of the term. If the leave is due to pregnancy, birth or adoption, and the employee begins leave during the five week period before the end of the term, the employee can be required to take leave until the end of the term if they would return during the two weeks before the term ends and the leave will last more than two weeks. If the leave is due to pregnancy, birth or adoption, and the employee begins leave during the three week period before the end of the term, the employee can be required to take leave until the end of the term if the leave will last more than five days. (29 C.F.R. § 825.602.) If the employer requires the employee to take additional leave

up to the end of the term, the additional time will not count against FMLA leave duration requirements. (29 C.F.R. § 825.603.)

The determination of how an employee is restored to “an equivalent position” after returning from FMLA leave shall be based on “established school board policies and practice, ... and collective bargaining agreements”. These policies and agreements must provide for restoration to positions with equivalent pay, benefits, and other terms and conditions of employment. (29 C.F.R. § 825.604.)

### Non-Discrimination Provisions

The new regulations provide that bonus awards for attendance can be based on the “achievement of a specified goal such as hours worked, products sold or perfect attendance” and therefore can be denied employees who have taken FMLA leave. However, FMLA leave and similar non-FMLA leave employees must be treated the same for purposes of such bonuses. (29 C.F.R. § 825.215(c)(2).)

Please contact any of our seven offices statewide with any questions regarding this topic.

*As the information contained herein is necessarily general, its application to a particular set of facts and circumstances may vary. For this reason, this Bulletin does not constitute legal advice. We recommend that you consult with your counsel prior to acting on the information contained herein.*

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