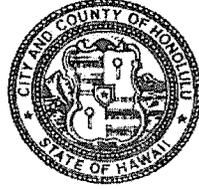


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KEN Y. NAKAMATSU
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January 22, 2009

TO: ALL DEPARTMENT AND AGENCY HEADS
VIA: ADMINISTRATIVE/PERSONNEL OFFICERS
FROM: *Mufi Hannemann*
KEN Y. NAKAMATSU, DIRECTOR
DEPARTMENT OF HUMAN RESOURCES

SUBJECT: UPDATED FAMILY AND MEDICAL LEAVE ACT (FMLA) REGULATIONS

On January 16, 2009, the Department of Labor's (DOL) final rules to implement amendments to the FMLA took effect. There are a number of amendments that you need to familiarize yourself with in order to comply with the law, in addition to the new military family leave entitlements. The following are some of the significant changes:

1. Military Family Leave:

a) Military Caregiver Leave

This benefit provides 26 weeks of FMLA leave during a single 12-month period for a spouse, child, parent, or next of kin caring for a recovering servicemember in the armed forces, National Guard or Reserves. This benefit is available to the employee in addition to any other qualifying FMLA leave taken, if applicable. In addition, this benefit is a "per-service member, per-injury" entitlement. An employee's family leave entitlement is limited to a combined total of 26 weeks during a single 12-month period for all qualifying reasons under FMLA and military leave.

b) Qualifying Exigency Leave

This benefit provides 12 weeks of FMLA leave for the employee to attend to exigencies that may result when a spouse, child or parent is on active duty or notified of an impending call or order to active duty, in the National Guard or Reserves in support of a contingency operation. [Note: This benefit is only applicable to the family members of an individual in the National Guard or Reserves and may be taken on an intermittent basis.]

The eight (8) categories of "qualified exigencies" include:

- Short-notice deployment
- Military events and related activities
- Childcare and school activities
- Financial and legal arrangements
- Counseling
- Rest and recuperation
- Post-deployment activities
- Additional activities (employer and employee agree to leave)

2. Employer Notification Requirements

- a) Attached is a revised FMLA notice (January 2009) to employees that all departments are required to display on bulletin boards. Please post this revised FMLA notice immediately. If your department requires additional notices, you can either make copies or you can access the document on the DOL website at:
<http://www.dol.gov/esa/whd/fmla/finalrule/FMLAPoster.pdf>
- b) Employers are required to notify employees who request FMLA leave of their eligibility within five (5) business days. Employers are also required to provide a written notice to employees taking FMLA of their rights and responsibilities and the consequences of not meeting the expectations. Once the Employer has sufficient information to determine that the leave qualifies under FMLA, the Employer has five (5) business days to provide a written notice to employees that designate FMLA leave.

3. Qualifying Service

To be eligible, the employee must have been employed for twelve (12) months and worked 1,250 hours in the previous twelve months. The period of employment does not have to be a consecutive period as long as a break in service does not exceed 7 years.

4. Serious Health Condition

The final rules retain the definitions of "serious health condition" but clarifies three (3) issues:

- If an employee is taking leave under the "three consecutive calendar days of incapacity plus two visits to a healthcare provider" definition, then the two visits must occur within 30 days of the period of initial incapacity, absent extenuating circumstances.

- If an employee is taking leave under the “three consecutive calendar days of incapacity plus a regimen of continuing treatment” definition, then the first visit to the healthcare provider must occur within 7 days of the initial incapacity.
- “Periodic visits to a healthcare provider” for chronic serious health conditions means at least two visits to a healthcare provider per year. [Note: The employer cannot require more frequent visits.]

5. Medical Certification Requirements

If necessary, an employer representative (excluding the employee’s direct supervisor) may contact the Health Care Provider to verify a medical certification. If the medical certification is insufficient to allow the employer to process the FMLA request, the employer must provide the employee a written notice identifying the missing information and provide the employee an opportunity to cure the deficiency. The employer’s request for additional information is limited to the information contained on the medical certification form.

6. New FMLA Forms

The DOL also has new and revised prototype FMLA forms. The DOL revised the old Certification of Health Care Provider form and now has separate forms for an Employee’s Serious Health Condition and a Family Member’s Serious Health Condition. The DOL also revised the Notice of Eligibility and Rights and Responsibilities form. New forms also have been created for the Designation Notice to Employee of FMLA Leave, Certification of Qualifying Exigency for Military Family Leave, and Certification for Serious Injury or Illness of Covered Servicemember for Military Family Leave.

While we review and consider revisions to our Federal Family and Medical Leave policy and forms, please use the following DOL FMLA forms. The forms can be found on the DOL website at:

Certification of Health Care Provider for an Employee’s Serious Health Condition (WH-380E)
<http://www.dol.gov/esa/whd/forms/WH-380-E.pdf>

Certification of Health Care Provider for a Family Member’s Serious Health Condition (WH-380F)
<http://www.dol.gov/esa/whd/forms/WH-380-F.pdf>

Notice of Eligibility and Rights and Responsibilities (WH381)
<http://www.dol.gov/esa/whd/fmla/finalrule/WH381.pdf>

Designation Notice to Employee of FMLA Leave (WH-382)
<http://www.dol.gov/esa/whd/forms/WH-382.pdf>

Certification of Qualifying Exigency for Military Family Leave (WH-384)
<http://www.dol.gov/esa/whd/forms/WH-384.pdf>

Certification for Serious Injury or Illness of Covered Servicemember for Military Family Leave (WH-385) <http://www.dol.gov/esa/whd/forms/WH-385.pdf>

Attached is a copy of the DOL's Final Rule on Family and Medical Leave that highlights the significant amendments for your review. For more information, you can access the DOL website at: <http://www.dol.gov/esa/whd/fmla/finalrule.htm>

We are planning to hold a training session to further discuss the FMLA amendments and will notify you as soon as we confirm a date and time. In the meantime, please be aware of possible FMLA situations and ensure that you are compliant with the new amendments before processing requests. Should you have any questions about the application of FMLA, please call Fay Yamamoto, Labor Relations Specialist, at 768-8551.

Attachments

EMPLOYEE RIGHTS AND RESPONSIBILITIES UNDER THE FAMILY AND MEDICAL LEAVE ACT

Basic Leave Entitlement

FMLA requires covered employers to provide up to 12 weeks of unpaid, job-protected leave to eligible employees for the following reasons:

- For incapacity due to pregnancy, prenatal medical care or child birth;
- To care for the employee's child after birth, or placement for adoption or foster care;
- To care for the employee's spouse, son or daughter, or parent, who has a serious health condition; or
- For a serious health condition that makes the employee unable to perform the employee's job.

Military Family Leave Entitlements

Eligible employees with a spouse, son, daughter, or parent on active duty or call to active duty status in the National Guard or Reserves in support of a contingency operation may use their 12-week leave entitlement to address certain qualifying exigencies. Qualifying exigencies may include attending certain military events, arranging for alternative childcare, addressing certain financial and legal arrangements, attending certain counseling sessions, and attending post-deployment reintegration briefings.

FMLA also includes a special leave entitlement that permits eligible employees to take up to 26 weeks of leave to care for a covered servicemember during a single 12-month period. A covered servicemember is a current member of the Armed Forces, including a member of the National Guard or Reserves, who has a serious injury or illness incurred in the line of duty on active duty that may render the servicemember medically unfit to perform his or her duties for which the servicemember is undergoing medical treatment, recuperation, or therapy; or is in outpatient status; or is on the temporary disability retired list.

Benefits and Protections

During FMLA leave, the employer must maintain the employee's health coverage under any "group health plan" on the same terms as if the employee had continued to work. Upon return from FMLA leave, most employees must be restored to their original or equivalent positions with equivalent pay, benefits, and other employment terms.

Use of FMLA leave cannot result in the loss of any employment benefit that accrued prior to the start of an employee's leave.

Eligibility Requirements

Employees are eligible if they have worked for a covered employer for at least one year, for 1,250 hours over the previous 12 months, and if at least 50 employees are employed by the employer within 75 miles.

Definition of Serious Health Condition

A serious health condition is an illness, injury, impairment, or physical or mental condition that involves either an overnight stay in a medical care facility, or continuing treatment by a health care provider for a condition that either prevents the employee from performing the functions of the employee's job, or prevents the qualified family member from participating in school or other daily activities.

Subject to certain conditions, the continuing treatment requirement may be met by a period of incapacity of more than 3 consecutive calendar days combined with at least two visits to a health care provider or one visit and a regimen of continuing treatment, or incapacity due to pregnancy, or incapacity due to a chronic condition. Other conditions may meet the definition of continuing treatment.

Use of Leave

An employee does not need to use this leave entitlement in one block. Leave can be taken intermittently or on a reduced leave schedule when medically necessary. Employees must make reasonable efforts to schedule leave for planned medical treatment so as not to unduly disrupt the employer's operations. Leave due to qualifying exigencies may also be taken on an intermittent basis.

Substitution of Paid Leave for Unpaid Leave

Employees may choose or employers may require use of accrued paid leave while taking FMLA leave. In order to use paid leave for FMLA leave, employees must comply with the employer's normal paid leave policies.

Employee Responsibilities

Employees must provide 30 days advance notice of the need to take FMLA leave when the need is foreseeable. When 30 days notice is not possible, the employee must provide notice as soon as practicable and generally must comply with an employer's normal call-in procedures.

Employees must provide sufficient information for the employer to determine if the leave may qualify for FMLA protection and the anticipated timing and duration of the leave. Sufficient information may include that the employee is unable to perform job functions, the family member is unable to perform daily activities, the need for hospitalization or continuing treatment by a health care provider, or circumstances supporting the need for military family leave. Employees also must inform the employer if the requested leave is for a reason for which FMLA leave was previously taken or certified. Employees also may be required to provide a certification and periodic recertification supporting the need for leave.

Employer Responsibilities

Covered employers must inform employees requesting leave whether they are eligible under FMLA. If they are, the notice must specify any additional information required as well as the employees' rights and responsibilities. If they are not eligible, the employer must provide a reason for the ineligibility.

Covered employers must inform employees if leave will be designated as FMLA-protected and the amount of leave counted against the employee's leave entitlement. If the employer determines that the leave is not FMLA-protected, the employer must notify the employee.

Unlawful Acts by Employers

FMLA makes it unlawful for any employer to:

- Interfere with, restrain, or deny the exercise of any right provided under FMLA;
- Discharge or discriminate against any person for opposing any practice made unlawful by FMLA or for involvement in any proceeding under or relating to FMLA.

Enforcement

An employee may file a complaint with the U.S. Department of Labor or may bring a private lawsuit against an employer.

FMLA does not affect any Federal or State law prohibiting discrimination, or supersede any State or local law or collective bargaining agreement which provides greater family or medical leave rights.

FMLA section 109 (29 U.S.C. § 2619) requires FMLA covered employers to post the text of this notice. Regulations 29 C.F.R. § 825.300(a) may require additional disclosures.



For additional information:
1-866-4US-WAGE (1-866-487-9243) TTY: 1-877-889-5627
WWW.WAGEHOUR.DOL.GOV





DOL's Final Rule on Family and Medical Leave Providing Military Family Leave and Updates to the Regulations

- On November 17, 2008, the Department of Labor (DOL) published its final rule to implement the first-ever amendments to the Family and Medical Leave Act (FMLA), signed into law by President Bush in January 2008, which provide new military family leave entitlements and to update the regulations under the 15 year-old FMLA. The final rule will improve communication between employees, employers, and health care providers to make the law operate more smoothly, and provide needed clarity for both workers and employers about their responsibilities and rights under the FMLA leave. The Final Rule does not reduce the law's coverage for workers who need FMLA leave. Updating and clarifying the regulations will reduce uncertainty and provide greater predictability in the workplace for everyone.
- The Department of Labor engaged in an extensive, transparent, multi-year fact-finding and review process before proposing changes to the FMLA in February 2008. The final rule was developed in response to:
 - The passage of the military family leave provisions in the National Defense Authorization Act (NDAA) for FY 2008, Public Law 110-181;
 - U.S. Supreme Court and lower court cases invalidating portions of the Department's regulations;
 - The Department's 15 years of experience enforcing and administering the FMLA;
 - Discussions with various stakeholders over the past six years (including a Fall 2007 stakeholder meeting that included health care providers); and
 - The receipt and review of over 4,600 public comments in response to the 2008 Notice of Proposed Rulemaking (NPRM); the review of over 15,000 public comments in response to the Department's December 2006 Request for Information (RFI); and the publication of the June 2007 FMLA Report on the RFI.

The Final Rule is responsive to the many comments submitted to the record. The Department received numerous comments in response to the RFI and the proposed rule reflecting the value of the FMLA to employees who take leave to care for a newborn child, for an ill family member, or for their own illness. However, DOL also heard about areas where the regulations are not working well; where there is ambiguity in the regulations; and where there is increasing friction between employers and employees as a result of these problems. The final rule improves on these areas and addresses many of these concerns.

HIGHLIGHTS OF THE REGULATORY CHANGES IN THE FINAL RULE

- **Military Family Leave:** Section 585(a) of the NDAA amended the FMLA to provide two new leave entitlements:

- 1) **Military Caregiver Leave (also known as Covered Servicemember Leave):** Under the first of these new military family leave entitlements, eligible employees who are family members of covered servicemembers will be able to take up to 26 workweeks of leave in a "single 12-month period" to care for a covered servicemember with a serious illness or injury incurred in the line of duty on active duty. Based on a recommendation of the President's Commission on Care for America's Returning Wounded Warriors (the Dole-Shalala Commission), this 26 workweek entitlement is a special provision that extends FMLA job-protected leave beyond the normal 12

weeks of FMLA leave. This provision also extends FMLA protection to additional family members (i.e., next of kin) beyond those who may take FMLA leave for other qualifying reasons.

- 2) **Qualifying Exigency Leave:** The second new military leave entitlement helps families of members of the National Guard and Reserves manage their affairs while the member is on active duty in support of a contingency operation. This provision makes the normal 12 workweeks of FMLA job-protected leave available to eligible employees with a covered military member serving in the National Guard or Reserves to use for “any qualifying exigency” arising out of the fact that a covered military member is on active duty or called to active duty status in support of a contingency operation. The Department’s final rule defines qualifying exigency by referring to a number of broad categories for which employees can use FMLA leave: (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 not encompassed in the other categories, but agreed to by the employer and employee.

The final rule also includes two new DOL certification forms that may be used by employees and employers to facilitate the certification requirements for the use of military family leave.

- **The Ragsdale Decision/Penalties:** The final rule includes a number of technical regulatory changes to reflect current law following the U.S. Supreme Court’s decision in *Ragsdale v. Wolverine World Wide, Inc.*, which invalidated a penalty provision of the regulations. *Ragsdale* ruled that the current regulation’s “categorical” penalty for failure to appropriately designate FMLA leave, which in that case would have required the employer to provide an additional 12 weeks of FMLA-protected leave after the 30 weeks of leave the employee had already received, was inconsistent with the statutory entitlement to only 12 weeks of FMLA leave and contrary to the statute’s remedial requirement that an employee demonstrate individual harm. Several other courts have also invalidated similar categorical penalties in other notice provisions of the current regulations. The final rule therefore removes these categorical penalty provisions and clarifies that where an employee suffers individualized harm because the employer failed to follow the notification rules, the employer may be liable.
- **Light Duty:** At least two courts have held that an employee uses up his or her 12 week FMLA leave entitlement while on a “light duty” assignment following FMLA leave. Under the final rule time spent performing “light duty” work does not count against an employee’s FMLA leave entitlement and that the employee’s right to restoration is held in abeyance during the period of time the employee performs light duty (or until the end of the applicable 12-month FMLA leave year). If an employee is voluntarily performing a light duty assignment, the employee is not on FMLA leave.
- **Waiver of Rights:** The final rule codifies the Department’s longstanding position that employees may voluntarily settle or release their FMLA claims without court or Department approval. Although this is not a change in the law, the clarification is needed because a recent Fourth Circuit decision interpreted the Department’s regulations as prohibiting employees from either prospectively or retroactively waiving their rights. Prospective waivers of FMLA rights continue to be prohibited under the final rule.
- **Serious Health Condition:** The final rule retains the six individual definitions of serious health condition while adding guidance on three regulatory matters. One of the definitions of serious health condition involves more than three consecutive, full calendar days of incapacity plus “two visits to a health care provider.” Because the current rule is open-ended, the Tenth Circuit has held that the “two visits to a health care provider” must occur within the more-than-three-days period of incapacity.

Under the final rule, the two visits must occur within 30 days of the beginning of the period of incapacity and the first visit to the health care provider must take place within seven days of the first day of incapacity. A second way to satisfy the definition of serious health condition under the current regulations involves more than three consecutive, full calendar days of incapacity plus a regimen of continuing treatment. The final rule clarifies here also that the first visit to the health care provider must take place within seven days of the first day of incapacity. Thirdly, the final rule defines “periodic visits” for chronic serious health conditions as at least two visits to a health care provider per year since that provision is also open-ended in the current regulations and potentially subjects employees to more stringent requirements by employers.

- **Substitution of Paid Leave:** FMLA leave is unpaid. However, the statute provides that employees may take, or employers may require employees to take, any accrued paid vacation, personal, family or medical or sick leave, as offered by their employer, concurrently with any FMLA leave. This is called the “substitution of paid leave.” The current regulations apply different procedural requirements to the use of vacation or personal leave than to medical or sick leave. Complicating matters even further, the Department has treated family leave differently than vacation and personal leave. Accordingly, under the final rule, all forms of paid leave offered by an employer will be treated the same, regardless of the type of leave substituted (including generic “paid time off”). An employee electing to use any type of paid leave concurrently with FMLA leave must follow the same terms and conditions of the employer’s policy that apply to other employees for the use of such leave. The employee is always entitled to unpaid FMLA leave if he or she does not meet the employer’s conditions for taking paid leave and the employer may waive any procedural requirements for the taking of any type of paid leave.
- **Perfect Attendance Awards:** The final rule changes the treatment of perfect attendance awards to allow employers to deny a “perfect attendance” award to an employee who does not have perfect attendance because of taking FMLA leave as long as it treats employees taking non-FMLA leave in an identical way. This addresses the unfairness perceived by employees and employers as a result of requiring an employee to obtain a perfect attendance award for a period during which the employee was absent from the workplace on FMLA leave.
- **Employer Notice Obligations:** The final rule consolidates all the employer notice requirements into a “one-stop” section of the regulations and reconciles some conflicting provisions and time periods under the current regulations. Further, the final rule clarifies and strengthens the employer notice requirements in order to better inform employees and allow for a better exchange of information between employers and employees. Employers will be required to provide employees with a general notice about the FMLA (through a poster, and either an employee handbook or upon hire); an eligibility notice; a rights and responsibilities notice; and a designation notice. In order to ensure employers are able to better inform employees under the new notice provisions, the final rule extends the time for employers to provide various notices from two business days to five business days.
- **Employee Notice:** The final rule modifies the current provision that has been interpreted to allow some employees to provide notice to an employer of the need for FMLA leave up to two full business days *after* an absence, even if they could have provided notice more quickly. Lack of advance notice (*e.g.*, before the employee’s shift starts) for unscheduled absences is one of the biggest disruptions employers point to as an unintended consequence of the current regulations. The final rule provides that an employee needing FMLA leave must follow the employer’s usual and customary call-in procedures for reporting an absence, absent unusual circumstances. The final rule also highlights (without changing) the existing consequences if an employee does not provide proper notice of his or her need for FMLA leave.

- **Medical Certification Process (Content and Clarification):** The final rule, which is the result of significant stakeholder feedback (including a Fall 2007 meeting at the Department on medical certifications) recognizes the advent of the Health Insurance Portability and Accountability Act (HIPAA) and the applicability of the HIPAA privacy rule to communication between employers and employees' health care providers. Further, in response to specific concerns raised by employees about medical privacy, the Department has added a requirement to the final rule that specifies that the employer's representative contacting the health care provider must be a health care provider, human resource professional, a leave administrator, or a management official, *but* in no case may it be the employee's direct supervisor. Further, employers may *not* ask health care providers for additional information beyond that required by the certification form. The final rule also improves the exchange of medical information by updating the Department's optional Form WH-380 to create separate forms for the employee and covered family members and by allowing—but not requiring—health care providers to provide a diagnosis of the patient's health condition as part of the certification.

In addition, the final rule specifies that if an employer deems a medical certification to be incomplete or insufficient, the employer must specify in writing what information is lacking, and give the employee seven calendar days to cure the deficiency. These changes will improve FMLA communications, protect the privacy of workers, and help ensure that the employees who need leave will get it and not be subject to repeated requests for additional information or be denied FMLA leave on a technicality.

- **Medical Certification Process (Timing):** The final rule codifies a 2005 DOL Wage and Hour Opinion letter that stated that employers may request a new medical certification each leave year for medical conditions that last longer than one year. The final rule also clarifies the applicable time period for recertification. Under the current regulations, employers may generally request a recertification no more often than every 30 days and only in conjunction with an FMLA absence unless a minimum duration of incapacity has been specified in the certification, in which case recertification generally may not be required until the duration specified has passed. Because many stakeholders have indicated that the current regulation is unclear as to the employer's ability to require recertification when the duration of a condition is described as "lifetime" or "unknown," the final rule restructures and clarifies the regulatory requirements for recertification. In all cases, the final rule allows an employer to request recertification of an ongoing condition every six months in conjunction with an absence.
- **Fitness-For-Duty Certifications:** The current FMLA regulations allow employers to enforce uniformly-applied policies or practices that require all similarly-situated employees who take leave to provide a certification that they are able to resume work. This is called a "fitness-for-duty" certification. The final rule makes two changes to the fitness-for-duty certification process. First, an employer may require that the certification specifically address the employee's ability to perform the essential functions of the employee's job. Second, where reasonable job safety concerns exist, an employer may require a fitness-for-duty certification before an employee may return to work when the employee takes intermittent leave.