

# eLABORate

November 21, 2008

## Department of Labor's Final Rule on Family and Medical Leave

At our recent employment and labor law seminars in Mississippi, Louisiana and Texas, we discussed the long awaited final regulations from the Department of Labor ("DOL"), which address the recent amendments to the Family & Medical Leave Act ("FMLA"). On Friday, November 14<sup>th</sup>, the Department of Labor finally released these long awaited regulations which make substantive changes to the FMLA, address the new military leave provisions and set forth new DOL notice and certification forms. Set forth below is a link to the final regulations for easy reference and highlights of the final regulations.

### Final Regulations Link:

<http://www.dol.gov/federalregister/PdfDisplay.aspx?DocId=21763>

### HIGHLIGHTS OF THE NEW FMLA REGULATORY CHANGES

**Military Family Leave:** On January 28, 2008, President Bush signed into law the National Defense Authorization Act ("NDAA") of 2008. Section 585(a) of the NDAA amended the FMLA to provide two new leave entitlements relating to military duty, service and leave necessitated by such duty/service:

- 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 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 – defined as nearest blood relative) 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 12 workweeks of FMLA job-protected leave available to eligible employees with a covered military member serving in the National Guard or Reserves if there is "any qualifying exigency" arising

out of the fact that a covered military member is either on active duty or, called to active duty status in support of a contingency operation. The Department's final regulations define "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 Ragsdale Decision/Penalties:** The final regulations include 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.* In *Ragsdale*, the Court had invalidated a penalty provision of the DOL's regulations addressing the retroactive designation of FMLA leave. The Court in *Ragsdale* ruled that the DOL's regulation providing for a "categorical" penalty for failure to appropriately designate FMLA leave was inconsistent with the FMLA's statutory entitlement to only 12 weeks of FMLA leave and was also contrary to the statute's remedial requirement that an employee demonstrate individual harm. Several other courts have invalidated similar categorical penalties in other notice provisions of the current regulations. The final regulations remove these categorical penalty provisions and clarify 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 regulations; (i) time spent performing "light duty" work does not count against an employee's FMLA leave entitlement; and, (ii) an 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.

*continued on page 2*

**Waiver of Rights:** The final regulations codify the DOL's longstanding position that employees may voluntarily settle or release their FMLA claims without either court or DOL approval. Although this is not a change in the law, the clarification was needed because a recent Fourth Circuit Court of Appeal decision interpreted the DOL's regulations as prohibiting employees from either prospectively or retroactively waiving their FMLA rights. (Note: prospective waivers of FMLA rights continue to be prohibited under the final regulations.)

**Serious Health Condition:** The final regulations retain 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 regulation 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 regulation, 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 that the first visit to the health care provider must take place within seven days of the first day of incapacity. The final regulations also define "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 DOL has treated family leave differently than vacation and personal leave. Accordingly, under the final regulation, 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 regulations change 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 change 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 regulations consolidate all the employer notice requirements into a "one-stop" section of the regulations and reconcile some conflicting provisions and time periods under the current regulations. Further, the final regulations clarify and strengthen 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 the following notices: (i) a general notice about the FMLA (through a poster, through an employee handbook, upon hire, etc.); (ii) an eligibility notice; (iii) a rights and responsibilities notice; and, (iv) a designation notice. In order to ensure employers are able to better inform employees under the new notice provisions, the final regulations extend the time for employers to provide various notices from two business days to five business days.

**Employee Notice:** The final regulations modify 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 regulations provide 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 regulations also highlight (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 regulations, which are the result of significant stakeholder feedback (including a Fall 2007 meeting at the DOL on medical certifications) recognize the advent of the Health Insurance Portability and Accountability Act (HIPAA) and the applicability of the HIPAA privacy regulation to communication between employers and employees' health care providers. Further, in response to specific concerns raised by employees about medical privacy, the DOL has added a requirement to the final regulations that specify 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.

*continued on page 3*

The final regulations also improve the exchange of medical information by updating the DOL'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 regulations specify 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 should 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 regulations codify 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 regulations also clarify 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. 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 regulations restructure and clarify the regulatory requirements for recertification. In all cases, the final regulations allow 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 regulations make 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.

**EFFECTIVE DATE/COMPLIANCE DATE:** The DOL's new regulations become effective January 16, 2009. All managers/supervisors of covered FMLA employers who deal with leave issues should become well acquainted with the new FMLA regulations in light of the substantive changes, some of which are noted above.

**EMPLOYER TIP:** Covered employers must update their FMLA policies as a result of the changes set forth in the final regulations so that their FMLA policies are compliant by the January 16<sup>th</sup> effective date.

## eLABORate

Inquiries concerning topics addressed in the eLABORate may be directed to any of our Employment Law attorneys:

### Jackson, Mississippi

Joseph L. Adams	adamsjo@phelps.com	(601) 360-9708
Deborah Shelby Dees	deesd@phelps.com	(601) 360-9334
Gary E. Friedman	friedmag@phelps.com	(601) 360-9355
Paul O. Miller, III	millerp@phelps.com	(601) 360-9350
W. Thomas Siler, Jr.	silert@phelps.com	(601) 360-9357
Mark Fijman	fijmanm@phelps.com	(601) 360-9716
Kenneth G. Fairly	fairlyk@phelps.com	(601) 360-9705
W. Brett Harvey	brett.harvey@phelps.com	(601) 360-9721
LaToya C. Merritt	merrittl@phelps.com	(601) 360-9749
Seale Pylate	pylates@phelps.com	(601) 360-9342
Sandra Brown Strong	browns@phelps.com	(601) 360-9729
Tori L. Winfield	winfielt@phelps.com	(601) 360-9366

### Baton Rouge, Louisiana

Susan W. Furr	furrs@phelps.com	(225) 376-0230
Karleen J. Green	greenk@phelps.com	(225) 376-0244
Thomas H. Kiggans	kigganst@phelps.com	(225) 376-0247
Jessica Coco	jessica.coco@phelps.com	(225) 376-7954
Mimi Flowers Plauché	plauchem@phelps.com	(225) 376-0279
Betty Burke Uzee	betty.uzee@phelps.com	(225) 376-0235

### New Orleans, Louisiana

M. Nan Alessandra*	alessann@phelps.com	(504) 584-9297
Jane E. Armstrong	armstroj@phelps.com	(504) 584-9244
Kim M. Boyle	boylek@phelps.com	(504) 679-5790
David M. Korn*	kornd@phelps.com	(504) 584-9374
Brandon Davis	brandon.davis@phelps.com	(504) 584-9312
Taryn Southon Nunes	nunest@phelps.com	(504) 584-9383
MaryJo Roberts	maryjo.roberts@phelps.com	(504) 584-9262

### Houston, Texas

Maureen B. Jennings	maureen.jennings@phelps.com	(713) 877-5523
---------------------	-----------------------------	----------------

### Tampa, Florida

Jolee Land	jolee.land@phelps.com	(813) 472-7857
Dennis M. McClelland	dennis.mcclelland@phelps.com	(813) 472-7865
John David Mullen	john.mullen@phelps.com	(813) 472-7867
John E. Phillips	john.phillips@phelps.com	(813) 472-7863
Miguel B. Bouzas	miguel.bouzas@phelps.com	(813) 472-7752
Erin L. Malone	erin.malone@phelps.com	(813) 472-7891

\*Contributing Author

All rights reserved, Phelps Dunbar LLP eLABORate is published as a service to clients and friends of Phelps Dunbar LLP and should not be construed as legal or professional advice or as opinion on specific fact.