



## **PMAA Regulatory Report DOL-1**

**Subject: Family and Medical Leave Act Regulations**

**Date: January 7, 2009**

**Issue: Revised Family and Medical Leave Act Regulations Effective January 16, 2009**

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**EXECUTIVE SUMMARY** – For businesses with 50 or more employees, new FMLA regulations will take effect January 16, 2009. Details of the new regulations are below.

### **DESCRIPTION OF NEW FMLA PROVISIONS**

On November 14, 2008, the U.S. Department of Labor issued new Family and Medical Leave Act (“FMLA”) regulations. The new regulations provide direction concerning “qualifying exigency” and “service member” leaves which were added to the FMLA as a result of amendments in January 2008, and also provide significant clarification in a number of other areas. The new regulations are effective January 16, 2009. Some of the highlights are set forth below.

#### **Employee Count – PEOs and Joint Employer Status (29 CFR § 825.106)**

Employers with 50 or more employees are covered by the FMLA. If two entities are considered “joint employers,” each employer must include the employees of both entities in determining whether the 50-employee threshold has been met.

The **new regulations** provide that employees of a Professional Employee Organization (“PEO”) are not considered in the 50-employee count if the PEO merely performs administrative functions such as payroll, benefits administration, etc. 29 CFR § 825.106(b)(2). The determination of whether the PEO is a joint employer is made based on the economic realities and specific facts and circumstances of the relationship. If the PEO has the right to hire, fire, assign or direct and control the client employer’s employees, it could be considered a joint employer with the client employer. However, there is good news for employers even in these instances. The client employer must include its own employees for purposes of determining whether the 50-employee threshold is met, but is only required to include other PEO employees if the client employer jointly employs those other individuals. 29 CFR Section 825.106(d).

#### **Eligible Employees – Breaks in Service (29 CFR § 825.110)**

An FMLA eligible employee is an employee who (i) has been employed by the entity for at least 12 months; (ii) has had at least 1250 hours of service in the 12-month period immediately preceding the leave; and (iii) is employed at a worksite where 50 or more employees are employed within a 75-mile radius.

The **new regulations** specify that, while the employee need not show 12 consecutive months of employment, the employee generally cannot count periods of employment preceding a break in service of seven years or more. (Exceptions include where a seven or more year break in service was due to National Guard service or Reserve military service, or where otherwise provided under a collective bargaining agreement or other written agreement.) 29 CFR § 825.110(b).

### **Serious Health Condition – Time Periods and Treatment Parameters (29 CFR § 825.115)**

The FMLA definition of “serious health condition” is quite broad, but the regulations now include a few time limitations and treatment parameters.

The serious health condition covers, for instance, an incapacity of more than three consecutive calendar days which also involves (a) treatment two or more times by a health care provider or other specified individual; or (b) treatment by a health care provider on at least one occasion with continuing treatment under the supervision of the health care provider. 29 CFR § 825.115(a).

The **new regulations** specify that the period of incapacity must be more than three full calendar days, and also specify the time periods in which the visits to the health care provider must take place. The first (or only) in-person visit to the health care provider or other designated individual must be within seven days of the first day of incapacity, and the two or more treatments must take place within thirty days of the first day of incapacity.

Serious health condition for purposes of the FMLA also covers a chronic condition which (i) requires periodic visits for treatment by a health care provider or other specified individual; (ii) continues over an extended period of time; and which (iii) may cause episodic incapacity. 29 CFR Section 825.115(c). The **new regulations** specify that the periodic visits for treatment must be at least twice a year.

### **Health Care Provider – Expansion of Definition (29 CFR § 825.125)**

The definition of health care provider has been expanded to include a physician’s assistant who is authorized to practice under state law and who is performing within the scope of his/her practice as defined under state law.

### **Exigency Leave - ( 29 CFR § 825.126)**

Eligible employees may take FMLA leave for a qualifying exigency involving the employee’s spouse, son, daughter, or parent who is on active duty or called to active duty status. Qualifying exigencies are broadly defined under the new regulations and include absence for:

- Issues related to short notice deployment
- Attendance at military events and related activities
- Arranging for or addressing child care and school activities
- Making financial and legal arrangements
- Attending counseling
- Rest and recuperation
- Attending post deployment activities

### **Service member Leave - (29 CFR § 825.127)**

Eligible employees may take FMLA leave to care for a current member of the armed forces who has a serious injury or illness incurred in the line of duty for which he or she is undergoing treatment, recuperation or therapy or who is in outpatient status, or who is otherwise on the temporary disability retired list. An employee is entitled to 26 workweeks of leave during a 12-month period for this type of leave. The 12-month period begins on the first day of the leave and ends 12 months from that date, regardless of the method normally used by the employer to calculate FMLA leave. The regulations provide a fairly extensive clarification of the terms and definitions regarding service member leave.

### **New Forms**

The regulations provide new and expanded forms for FMLA administration which are more user-friendly:

- Certification of Health Care Provider – Employee’s Serious Health Condition
- Certification of Health Care Provider – Family Member’s Serious Health Condition
- Notice of Employee Rights and Responsibilities
- Employer Notice to Employee of Eligibility and Rights and Responsibilities
- FMLA Designation Notice
- Certification of Qualifying Exigency for Military Family Leave
- Certification for Serious Injury or Illness of Covered Service member