New FMLA and New York Employee Privacy Requirements

New U.S. Department of Labor (DOL) regulations regarding the Family and Medical Leave Act (FMLA) take effect on January 16, 2009. They implement two types of new military family leave (Military Caregiver leave and Qualifying Exigency leave) and update and clarify the existing FMLA regulations. In addition, a recent amendment to the New York Labor Law, effective January 3, 2009, restricts an employer's use and disclosure of an employee's personal identifying information, including an employee's social security number.

The New FMLA Regulations

In 2008, the FMLA was amended to grant family members of military servicemembers the right to take job-protected, unpaid leave in the event of the servicemember's serious illness, injury, or other qualifying exigency. The Military Caregiver leave entitlement allows eligible employees who are family members of servicemembers to take up to 26 workweeks of unpaid leave in a single 12-month period to care for a servicemember with a serious illness or injury incurred in the line of duty on active duty. Employers should note that the 26-week entitlement is longer than the 12-week period provided for by both traditional FMLA leave and Qualifying Exigency leave (discussed below). Military Caregiver leave also is available to family members beyond those who are eligible for FMLA leave for other qualifying reasons.

The new regulations provide flexibility as to how an employee can allocate the 26 weeks of Military Caregiver leave. For example, during a single 12-month period, an eligible employee may take 18 weeks of leave to care for a covered servicemember and 8 weeks of leave to care for a second covered servicemember or the same servicemember with a subsequent serious illness. In addition, an employee may take 16 weeks of Military Caregiver leave and 10 weeks of leave to care for the birth of their child. In all events, however, an employee may not take more than 26 weeks of leave in a single 12-month period for various qualifying FMLA reasons. The regulations also provide that when leave qualifies as both Military Caregiver leave and traditional FMLA leave, the employer must designate the leave as Military Caregiver leave.

The new Qualifying Exigency leave extends the normal 12-week unpaid FMLA leave to eligible employees for "any qualifying exigency" arising out of the fact that a covered family member is on active duty or is "called to active duty status in support of a contingency operation." Qualifying Exigency leave is not available to employees whose family members serve in the regular military. Rather, Qualifying Exigency leave covers Reservists and National Guard members who are on, or called to, active duty. Moreover, Qualifying Exigency leave is available only for covered relatives of National Guard members who are called to active federal service by the President, and not for those in the National Guard who are recalled to state service by the governor of the servicemember's home state. The new regulations provide the following categories for which an employee can use Qualifying Exigency leave:

1. **Short-notice deployment.** To address any issues arising from short-notice (seven or fewer days of notice) deployment. An employee may take leave for seven calendar days beginning on the deployment notification date.

2. **Military events and related activities.** To attend military ceremonies, qualifying events, informational briefings, and "family support or assistance programs."

3. **Childcare and school activities.** To arrange for or provide urgent childcare, to enroll a child in a new school, or to attend meetings with staff at school or day care.

4. **Financial and legal arrangements.** To make or update financial or legal arrangements or to act as the military member's representative before a governmental agency to maintain military service benefits.

5. **Counseling.** To attend active duty-related counseling for oneself, the military member or a child.

6. **Rest and recuperation.** To spend time with a family member who is on short-term rest and recuperation leave during the period of deployment. Five days of leave may be taken for each instance of rest and recuperation.

7. **Post-deployment activities.** To attend arrival ceremonies, reintegration briefings, or any other official ceremony or program for a period of 90 days following the termination of active duty status.

8. **Additional activities agreed to by the employer and employee.** "To address other events" related to active duty status, provided that the employer and employee agree to the timing and duration of the leave.

The new regulations also make some significant changes to the existing FMLA regulations, which include the following:

Substituting Employer Legal Action Liability for DOL penalties. The new regulations provide that if an employee suffers individualized harm resulting from an employer's failure to follow FMLA notification and designation rules, the employer may be held liable to the employee in a legal action rather than being penalized by the DOL.

Imposing stricter notice requirements on employers. Employers are now required to provide employees with general notice about the FMLA (through a poster and either an employee handbook or notice upon hiring), an eligibility notice, a rights and responsibility notice, and a designation notice. The regulations extend the time for employers to provide these notices from two business days from the triggering event to five business days from the triggering event.

Clarifying that no approval is required for settlements. The new regulations provide that employees may voluntarily settle FMLA claims without court or DOL approval. Prospective waiver of FMLA rights remains prohibited.

"Light duty" work does not count towards FMLA leave. Time spent on "light duty" work does not count towards an employee's FMLA leave entitlement, and the employee's right to job restoration is "held in abeyance" during the light duty period.

Permitting the denial of "perfect attendance awards." Employers may now deny a "perfect attendance" award to an employee who did not have perfect attendance because he or she took FMLA leave as long as the employer treats employees taking non-FMLA leave the same.

Requiring employees to call in. The new regulations provide that an employee taking FMLA leave must follow the employer's normal and customary call-in procedures unless there are unusual circumstances.

Medical certification process must comply with HIPAA. The regulations align the FMLA with the Health Insurance Portability and Accountability Act (HIPAA), applying HIPAA's medical privacy rule to communications between employers and employees' health care providers. The regulations limit who may contact the health care provider and explicitly ban an employee's direct supervisor from making the contact.

Clarifying the definition of "serious health condition." One of the definitions of "serious health condition" entails an employee taking leave for more than three consecutive calendar days of incapacity, plus two visits to a health care provider. The new regulations provide that the two visits to the health care provider must occur within 30 days of the period of incapacity, with the first visit occurring within seven days of the beginning of the incapacity. As to the definition of "serious health condition" that entails a regimen of continuing treatment, the new regulations also provide that the first visit to the health care provider must occur within seven days of the beginning of the incapacity. The new regulations define "periodic visits to a health care provider" for chronic serious health conditions as at least two visits to a health care provider per year.

Clarifying when paid leave can be substituted. An employee electing to use 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 paid leave. The employee remains entitled to unpaid FMLA leave if the employee does not meet the employer's conditions for taking paid leave. Employers may waive any procedural requirements for the taking of paid leave.

Employee has a duty to schedule non-disruptive leave. An employee taking intermittent FMLA leave for planned medical treatment has a duty to make a "reasonable effort" to schedule the leave in a manner that does not disrupt the employer's operations.

Thus, the new regulations bring important changes to FMLA practices in the workplace. We suggest that employers should:

Update family and medical leave policies. Employers should revise their FMLA-related policies to comply with the DOL's new regulations, particularly the new provisions on Military Caregiver and Qualifying Exigency leave.

Become familiar with the new FMLA certification forms. The new regulations include various new forms to use, for example, to certify the serious health conditions of an employee or of an employee's family member or to facilitate military leave certification requirements.

Revise FMLA notice procedures to comply with new, stricter guidelines. Employers must display an updated FMLA poster and should be sure that all new hires receive appropriate notice of their FMLA rights.

Train managers and Human Resources staff. Employers should train managers and Human Resources staff regarding leave practices, how to handle leave notice and certification, and the new contours of the FMLA regulations.

The New New York Employee Privacy Law

Amendment of the New York Labor Law, effective January 3, 2009, restricts an employer's disclosure and use of an employee's social security number and communication of an employee's personal information. As to social security numbers, employers may not (1) publicly post or display an employee's social security number; (2) print an employee's social security number on any identification badge or time card; (3) keep an employee's social security number in a file with unrestricted access; or (4) use an employee's social security number as an identification number for purposes of occupational licensing. The new law further prohibits an employer from communicating to the general public an employee's personal information, which is defined as including an employee's social security number, home address or telephone number, personal e-mail address, Internet identification name or password, parent's surname prior to marriage, or driver's license number. Employers may be fined up to $500 for any knowing violation of the statute, and an employer's failure to implement policies or procedures designed to safeguard against the prohibited use of social security numbers and employee personal information is considered presumptive evidence of a knowing violation of the statute. Accordingly, New York employers should revise their workplace policies in order to ensure compliance with this new employee privacy law.

Hughes Hubbard's Labor and Employment department has extensive experience counseling employers with FMLA and employee privacy issues and would be pleased to assist you in ensuring your company's compliance.

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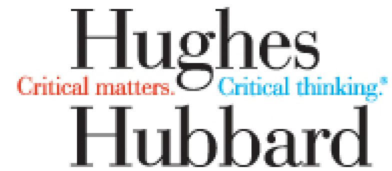

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