November 17, 2008

Labor & Employment Law Alert


Today the U.S. Department of Labor issued final regulations on the Family Medical Leave Act of 1993, as amended. The 201 pages of comment and regulations clarify, modify, and add to the prior FMLA regulations that have been in effect for the past 13 years. The final regulations also provide the much anticipated interpretation and regulatory framework for the military family leave amendments of January 2008. The final regulations become effective 60 days from today or, January 16, 2009.

Comparing the New Regulations to the 1995 Regulations

Employers should note some significant differences from the 1995 regulations:

- **Professional Employer Organizations (PEOs).** The regulations have been clarified so that PEOs that merely handle administrative functions, including payroll, benefits, regulatory paperwork and updating employment policies, are not joint employers with their clients. However, if, in contrast, a PEO has the right to hire, fire, assign, or direct and control the employees, or the PEO benefits from the work that the employees perform, then the PEO is a joint employer with the client. In those cases in which a PEO is determined to be a joint employer of a client employer’s employees, the client employer would only be required to count employees of the PEO (or employees of other clients of the PEO) if the client employer jointly employed these employees.

- **Definition of “eligible employee.”** There is a new definition for determining whether an employee has worked the requisite 12-months in order to be eligible for FMLA leave. While the 12-months need

What to do

Employers may wish to do the following:

- familiarize themselves with the new regulations and in particular those pertaining to military family leave,
- review and refine existing FMLA policies, procedures and forms to bring them into compliance with the final FMLA regulations by the January 16, 2009 effective date,
- develop a compliance strategy which includes taking advantage of changes beneficial to employers while minimizing the negative impact of the expansion of FMLA rights in favor of employees, and
- review other employment - policies that may limit your ability to take advantage of certain rights for employers that the final regulations provide.
not be consecutive, any period of employment prior to a break in service ending 7 or more years prior to the employee’s last date of rehire need not be counted toward the 12 month calculation unless: (1) the break in service was due to the employee’s fulfillment of his or her National Guard or Reserve military service obligations; or (2) a written agreement, including a collective bargaining agreement, exists establishing the employer’s intention to rehire the employee after the break in service (e.g. for purposes of the employee furthering his or her education or for childrearing purposes).

• “Continuing treatment” definition. The Department of Labor clarified the definition of a serious health condition involving “continuing treatment.” More specifically, the final regulations state that to qualify as a serious health condition involving continuing treatment there must be a period of incapacity of more than 3 consecutive, full calendar days that also involves: (1) treatment by a health care provider (or by a nurse under direct supervision of a health care provider, or by a provider of health care services under orders of, or referral by, a health care provider) 2 or more times, within 30 days of the first day of incapacity, unless extenuating circumstances exist; or (2) treatment by a health care provider, on at least one occasion, which results in a regimen of continuing treatment under the supervision of a health care provider. The final regulations state that "treatment by a health care provider" means an in-person visit to a health care provider and, that the first (or only) in-person treatment visit must take place within 7 days of the first day of incapacity.

• “Chronic condition” definition. The regulations clarify the definition of a "chronic condition" as a serious health condition. More specifically, the final regulations state that the condition must require periodic visits, defined as at least 2 times per year, for treatment by a health care provider or nurse under the direct supervision of a health care provider; must continue over an extended period of time; and may cause episodic rather than continuous periods of incapacity.

• Definition of health care provider. The final regulations include physician assistants as qualifying health care providers for FMLA purposes even if they are not working under the direct supervision of a physician, provided they are operating within their authorization to practice under State law.

• Defining a “workweek” for employees whose work schedule varies. Where an employee’s hours worked each week varies, the new regulations require employers to use the weekly average of hours from the 12-month period prior to the leave period. (Previously, the average weekly average over the 12 weeks preceding the leave was sufficient.)

• Notice provisions. The regulations contain several changes to the notice provisions for employees and employers, including but not limited to: (1) New optional Department of Labor forms for use; (2) The ability of the employer to retroactively designate FMLA leave provided doing so does not harm the employee, which conforms
with a prior Supreme Court decision to that effect; (3) An obligation on the part of the employee making subsequent requests for FMLA leave based upon the same FMLA-qualifying reason to specifically reference the qualifying reason or need for FMLA in any later requests; (4) An employer's obligation to provide at least one reason why the employee is not eligible for leave; and (5) The employer's obligation to notify the employee of the amount of leave counted against the employee's FMLA leave entitlement.

- **Annual medical certifications.** In situations in which employees have a medical certification on file for a serious health condition that may arise, employers can request annual medical certifications arguably even where the request is not associated with an absence. Note that this annual certification would be subject to the second and third opinion rules.

- **New optional medical certification forms.** The Department of Labor has introduced two new optional medical certification forms - WH-380 for an employee's own serious health condition and WH-380F for the serious health condition of a family member.

- **Use of other medical information.** Employers may review and take into consideration when making FMLA determinations information submitted in connection with a claim for worker's compensation, short term disability or other paid leave policy or disability plan.

- **Curing incomplete and insufficient certifications.** The final regulations include a new requirement for employers to state in writing that a certification is incomplete and insufficient as well as the additional information that is needed to make the certification complete and sufficient. The employer must then give the employee 7 days to cure the deficient certification, but if the certification's deficiency is not cured; the employer may deny the FMLA leave. Further, if the certification is not resubmitted, the employer may deny the leave for failure to provide certification.

- **Clarification and authentication of medical certification.** After providing the employee an opportunity to cure an incomplete and insufficient medical certification, the employer may contact the health care provider to verify that the information on the certification was completed or authorized by the health care provider and/or to understand the handwriting on the medical certification or to understand the meaning of the response. To make such contact, the employer must use a health care provider, a human resources professional, a leave administrator, or a management official. Under no circumstances, however, may the employee's direct supervisor contact the employee's health care provider.

- **HIPAA Authorizations.** In recognition of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), the regulations state that if the employee or
employee's family member will not provide HIPAA authorization allowing the employer to clarify a question regarding medical certification, and does not otherwise clarify the unclear medical certification, the employer may deny the leave.

- **The ability to talk directly with the health care provider.** An employer may request (but not require) that an employee authorize the employer to talk directly to the treating health care provider.

- **Recertification.** The final regulations clarify the parameters of recertification, including but not limited to situations where the treating health care provider specifies a minimum duration in the certification (i.e., 40 days or lifelong). Under the old regulations, the employer could not request recertification during that period. However, the regulations now provide that in all cases in connection with an absence the employer can at least request recertification every 6 months. Therefore, if a lifelong condition is identified the employer may only be able to request recertification every 6 months. Similar to the 1995 regulations, the final regulations do provide exceptions to this rule.

- **Fitness for duty reports.** Fitness for duty reports also received some attention in the final regulations. Significantly, employers have the opportunity to seek a fitness for duty certification that requires the health care provider to address the employee’s ability to perform the essential functions of his or her job, but only with regard to the particular health condition that caused the employee’s need for FMLA.

With respect to intermittent or reduced schedule leave, the regulations clarify that an employer is not entitled to certification of fitness for each absence taken; rather, an employer is entitled to certification of fitness to return to duty for such absences up to once every 30 days if reasonable safety concerns exist regarding the employee’s ability to perform his or her duties. However, the regulations provide that if the employer wants fitness for duty certifications under such circumstances (or a different interval so long as it is not more frequent than every 30 days) the employer must advise the employee of the requirement at the same time it issues the designation notice. The final regulations prohibit the employer from terminating the employee while it awaits this certification.

- **Bonuses.** The final regulations provide some relief to employers in terms of bonuses. Employers may deny bonuses or other awards that are conditioned upon the achievement of a specified goal such as hours worked, products sold or perfect attendance, when the employee fails to meet the goal in part because of the taking of FMLA-qualifying leave, unless otherwise paid to employees on an equivalent leave status for a non-FMLA qualifying reason.

**Military Family Leave**

The Department of Labor states that it engaged in "extensive discussions" with the Departments of Defense and Veterans Affairs before finalizing these regulations. In addressing the military family leave, the Department of Labor attempted to create
procedures that would be the same as those used for other types of FMLA leave whenever possible. Where feasible, the Department of Labor incorporated the military family leave requirements into the other provisions concerning the traditional types of FMLA leave and created four new regulatory sections – §§ 825.126, 825.127, 825.309 and 825.310 – which address specific employee and employer responsibilities for purposes of military family leave. Generally speaking, §§ 825.126 and 825.127 discuss an employee’s entitlement to qualifying exigency and military caregiver leave respectively. Sections 825.309 and 825.310 cover the certification requirements for taking qualifying exigency and military caregiver leave respectively.

It should be noted that an employee whose covered family member is a member of the Regular Armed Forces is not eligible for Qualifying Exigency Leave. Only an employee whose covered family member is on active duty, or called to active duty, from a reserve component (or re-called from retirement) may be eligible for Qualifying Exigency Leave. In the case of a covered family member being re-called to service from retirement, it does not matter whether the service member retired from the Regular Armed Forces or from a reserve component. When considering eligibility for Military Caregiver Leave, discussed below, the Regular Armed Forces family member is eligible to the same extent as the family member in situations involving a qualifying exigency.

Qualifying Exigency Leave

Pursuant to the January 2008 amendment to the FMLA, eligible employees are entitled to take up to 12 workweeks in any 12-month period of unpaid leave because of any qualifying exigency (as defined by the Department of Labor) arising out of the fact that the employee’s spouse, son, daughter, or parent is a covered military member on active duty (or has been notified of an impending call or order to active duty) in support of a contingency operation. Although the amendment occurred in January of 2008, the Department of Labor took the position that this portion of the amendment was not effective until it could issue regulations defining the term "qualifying exigency." That has now occurred and employers should be prepared to start receiving, analyzing and deciding on FMLA leave requests due to a qualifying exigency. Please note, this 12 workweeks of leave is not in addition to an employee’s 12-week FMLA entitlement for other reasons, e.g., serious health condition or bonding; it is merely another reason for which FMLA leave may be available.

What is a “qualifying exigency”? 

Although unexpected by many, the Department of Labor has developed a specific and exclusive list of reasons for which an eligible employee can take leave because of a qualifying exigency; a decision that will most likely be applauded and appreciated by most employers. The reasons are divided into seven general categories and one optional category: (1) short-notice deployment, (2) military events and related activities, (3) childcare and school actives, (4) financial and legal arrangements, (5) counseling,
(6) rest and recuperation, (7) post-deployment activities, and (8) additional activities.

1. Short notice deployment (§ 825.126(a)(1))

Leave to address any issue that arises from being notified of an impending call or order to active duty 7 or less calendar days prior to the date of deployment. This leave can be for a period of up to 7 days beginning on the date the covered service member is notified of deployment. Therefore any leave taken outside the 7 day period must qualify under one of the other categories of qualified exigency.

2. Military Events and Related Activities (§ 825.126(a)(2))

Leave to attend any official ceremony, program or event sponsored by the military or to attend family support and assistance programs and informational briefings sponsored or promoted by the military, military service organizations, or the American Red Cross that are related to the active duty or call to active duty status of the covered service member.

The Department of Labor has indicated that this is intended to provide leave for arrival and departure ceremonies, pre-deployment briefings, briefings for family during the period of deployment and post-deployment briefings which occur while the covered military member is on active duty or call to active duty status.

3. Childcare and School Activities (§ 825.126(a)(3))

Leave to arrange for childcare or attend certain school activities for the child of the covered military member.

The Department of Labor has indicated that in formulating the list of childcare and school activities it attempted to identify childcare and school activities that require attention because of the covered military member is on active duty or called to active duty status, rather than routine events that occur regularly for all parents. The final regulations identify the following four types of activities for which this leave applies, and for each category the Department of Labor offered examples, which are set forth here.

(1) to arrange for alternative childcare when the active duty or call to active duty status necessitates a change to in the existing childcare arrangements;

(The Department of Labor has offered examples, including leave to enroll a child in a summer camp or similar kind of summer day care at the end of the school year if a covered military member is still on active duty; or where the absence of the covered military member disrupts the pre-existing childcare arrangement, such as when the covered military member can no longer provide transportation to/from childcare and the employee must take leave to make new arrangements)
(2) to provide childcare on an urgent, immediate need basis (but not on a routine, regular, or everyday basis) when the need to provide such care arises from active duty or the call to active duty;

(Department of Labor has offered as an example, leave to care for the child of a covered military member if the child has become sick and needs to be immediately picked up from daycare or school.)

(3) to enroll the child in or transfer the child to a new school or day care facility when enrollment or transfer is necessitated by the active duty or call to active duty.

(Department of Labor has offered as an example, leave to enroll a child into a new school or day care facility during the school year when the child has moved or relocated due to the active duty or call to active duty status of a covered military member.)

(4) to attend meetings with staff at a school or day care facility, such as meetings with school officials regarding disciplinary measures, parent-teacher conferences, or meetings with school counselors, when such meetings are necessary due to circumstances arising from active duty or a call to active duty.

(The Department of Labor stated that this leave is not intended to provide leave for routine academic concerns.)

4. Financial and legal arrangements (§ 825.126(a)(4))

Leave to make or update financial or legal arrangements to address the covered military member's absence while on active duty or call to active duty status (e.g. preparing and executing financial and healthcare powers of attorney, transferring bank account signature authority, enrolling in the Defense Enrollment Eligibility Reporting System ("DEERS"), obtaining military ID cards, or preparing or updating wills and trusts). The Department of Labor stated in its comments that while this list is not exhaustive, it does illustrate that leave is intended to address issues directly related to the covered military member's absence, and not routine matters such as paying bills.

This regulation also allows leave for the employee to act as the covered service member's representative before a federal, state, or local agency for purposes of obtaining, arranging or appealing military service benefits while the covered service member is on active duty or call to active duty status and for a period of 90 days following the termination of the covered military member’s active duty status.

5. Counseling (§ 825.126(a)(5))

Leave to attend counseling provided by someone other than a healthcare provider for
oneself, for the covered service member, or for the child of the covered military member provided the need for the counseling arises from the active duty or call to active duty status of a covered military member.

The Department of Labor expects that most counseling will fall under the existing FMLA, but recognizes that there may be circumstances wherein military families may seek counseling that is non-medical in nature. The Department of Labor goes on to state that this provision is intended to cover counseling not already covered by the FMLA because the provider is not recognized as a health care provider, e.g. counseling provided by a military chaplain, pastor or minister, or counseling offered by the military or a military service organization that is not provided by a health care provider. If it is medical counseling, the employer has the right to require a medical certification.

6. **Rest and Recuperation (§ 825.126(a)(6))**

Leave to spend time with the covered service member who is on short-term, temporary rest and recuperation leave during the period of deployment. Eligible employees may take up to 5 days leave for each instance of rest and recuperation.

The Department of Labor comments that this may be triggered while the covered service member is on leave from active duty in support of a contingency operation, including during a period of deployment.

7. **Post-Deployment Activities (§ 825.126(a)(7))**

Leave to attend arrival ceremonies, reintegration briefings and events, and any other official ceremony or program sponsored by the military for a period of 90 days following the termination of the covered military member’s active duty; or to address issues that arise from the death of a covered military member while on active duty status, such as meeting and recovering the body of the covered service member and making funeral arrangements.

8. **Additional Activities (§ 825.126(a)(8))**

Leave to address other events which arise out of the covered military member’s active duty or call to active duty status provided the employer and employee agree that such leave shall constitute a qualifying exigency, and agree to both the timing and duration of the leave.

The Department of Labor’s comments suggest that this last provision was its attempt to appease both those who wanted an exhaustive list of what qualifies as an exigency and those who rejected a per se list and instead wanted general guidelines or broad categories and examples or non-exhaustive lists of the types of situations which would be qualifying exigencies.
Who qualifies as the employee’s son or daughter?

The final rules do not modify the FMLA’s statutory definition of "son or daughter" but rather establish a separate definition of "son or daughter on active duty or a call to active duty status" for the purpose of a qualifying exigency, which is defined as an employee’s biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stood in loco parentis, who is on active duty or call to active duty status, and who is of any age. (§ 825.122 (g)).

An employer may require the employee giving notice of the need for leave to provide reasonable documentation or statement of family relationship. This documentation may take the form of a simple statement form the employee, or a child’s birth certificate, a court document, etc. (§ 825.122(j)).

What does it mean to be on active duty or a call to active duty status?

Active duty means duty under a call or order to active (or notification of an impending call or order to active duty) in support of a contingency operation pursuant to:

- Section 688 of Title 10 of the US Code – retired members of the Regular Armed Forces and members of the retired Reserve who retires after completing at least 20 years of active service.
- Section 12301(a) of Title 10 – reserve component members to active duty in the time of war or national emergency;
- Section 12302 of Title 10 – any unit or unassigned member of the Ready Reserve to active duty;
- Section 12304 of Title 10 – ordering any unit or unassigned member of the Selected Reserve and certain members of the Individual Ready Reserve
- Section 12305 of Title 10 – suspension of promotion, retirement or separation rules for certain Reserve components;
- Section 12406 – calling of the National Guard into federal service in certain circumstances;
- Chapter 15 of Title 10 – calling the National Guard and state military into federal service in the case of insurrections and national emergencies; or
- any other provision of law during a war during a national emergency declared by the President or Congress so long as it is in support of a contingency operation.

(825.126 (b)(2)).
Who is on active duty or call to active duty status? (§ 825.126(b)(2)(i) and (ii)).

Eligible employees may take FMLA leave because of a qualifying exigency when the covered military member is on active duty or call to active duty status in support of a contingency operations mentioned above as either: (1) a member of the reserve components (Army National Guard of the US, Army Reserve, Navy Reserve, Marine Corps Reserve, Air National Guard of the US, Air Force Reserve and Coast Guard Reserve), or (2) a retired member of the Regular Armed Forces or Reserve.

As stated above, an employee whose family member is a member of the Regular Armed Forces is not eligible to take leave because of a qualifying exigency. Further, State calls to active duty are not covered unless under order of the President of the United States pursuant to one of the provisions of law identified in § 825.126(b)(2) above in support of a contingency operation.

What is a contingency operation?

The statutory definition from 10 U.S.C. 101(a)(13) is fully reinstated in § 825.126(b)(3), and reads: “A military operation qualifies as a contingency operation if it is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or results in the call or order to, or retention on, active duty of members of the uniformed services under Sections 688.12301(a), 12302, 12304, 12305, or 12406 of this title, chapter 15 of this title, or any other provision of law during a war or during a national emergency declared by the President or Congress.”

According the final regulations, the active duty orders of a covered military member will generally specify if the service member is serving in support of a contingency operation by citation to the relevant citation to Title 10 of the US Code and/or by reference to the specific name of the contingency operation. (§ 825.126(b)(3)). Consequently, the Department of Labor takes the position that it will be “fairly easy” for employees and employers to determine whether a particular covered military member’s active duty qualifies for qualifying exigency leave.

As set forth in § 825.309, a copy of active duty orders must be provided to an employer upon an employee’s first request for leave because of a qualifying exigency. Further, the certification section of the regulations provides that an employer can verify a covered service member’s active duty status in support of a contingency operation with the Department of Defense.

What notice does the employee have to provide to the employer?

When the need for leave is foreseeable, notice must be provided as soon as
practicable, regardless of how far in advance such leave foreseeable. (§ 825.302). Further, the employee must provide at least verbal notice sufficient to make the employer aware that the employee needs leave due to a qualifying exigency, that a covered military member is on active duty or call to active duty status, and that the requested leave is for one of the reasons listed in § 825.126(a) above.

**Does the employee have to provide certification of the need for leave because of a qualifying exigency? (§ 825.309)**

Yes. An employer may request the employee to provide a copy of the covered military member’s active duty orders or other documentation issued by the military which indicates that the covered military member is on active or call to active duty status in support of a contingency operation, and the dates of active duty service only the first time an employee requests leave for this reason. However, the employer can request new active duty orders or documentation if the need for leave arises out of different active duty or call to active duty status of the same or different covered military member.

An employer can require that the certification contain the following:

1. A statement or description, signed by the employee, of appropriate facts regarding the qualifying exigency for which FMLA leave is requested and any available supporting documentation (e.g. meeting announcement, a copy of a bill for services for handling a legal or financial matter).

2. The approximate date on which the qualifying exigency commenced or will commence;

3. If leave is requested for a single-continuous period, the beginning and end dates for the absence;

4. If leave is requested on an intermittent or reduced schedule, an estimate of the frequency and duration of the qualifying exigency; and

5. If the qualifying exigency involves meeting with a 3rd party, appropriate contact information for the individual or entity and a brief description of the purpose of the meeting.

The Department of Labor has developed an optional form (WH-384). Employers can use a different form but no information beyond this section may be requested. If the form submitted by the employee is completed and sufficient, the employer cannot require additional information. However, if the qualifying exigency requires meeting with a 3rd party, the employer may contact the 3rd party to verify the meeting or appointment schedule and nature of the meeting between the employee and the 3rd party. The employee’s permission is not required. An employer may also contact an appropriate
unit of the Department of Defense to request verification that a covered military member is on active duty or call to active duty status. The employee’s permission is not required. Whether contacting the 3rd party or the Department of Defense no other information may be requested.

**Leave to Care for a Covered Service Member**

Section 825.127 concerns the new type of military family leave for an employee to care for a covered service member with a serious injury or illness. Several conditions need to exist before an employee will be eligible for this leave.

**Required Circumstances Associated with the Covered Service Member**

The employee must need leave with respect to a covered service member, defined as a current member of the Armed Forces, including a member of the National Guard or Reserves. Note the difference that this leave IS available for injured members of the Regular Armed Services while leave for a qualifying exigency pertains only to individuals called up from the reserves or out of military retirement. (§825.127(a) compared to §825.126(b)(2)(i))

The covered service member must have a serious injury or illness that renders the service member medically unfit to perform the duties of his or her office, grade, rank or rating.

The covered service member must have become injured or ill in the line of duty on active duty and must be:

- undergoing medical treatment, recuperation, or therapy; or
- otherwise in outpatient status (where a member of the Armed Forces is assigned to a military medical treatment facility as an outpatient or is otherwise assigned to a unit for purposes of receiving medical care as an outpatient); or
- otherwise on the temporary disability list.

**Required Circumstances Associated with the Employee and his or her relationship with the Covered Service Member**

In order to be eligible for FMLA leave to care for a covered service member, an eligible employee must be the spouse, son, daughter, parent, or next of kin of the covered service member. (§825.127(b))

The son or daughter of a covered service number is any biological, adopted, or foster child, stepchild, legal ward, or a child for whom the covered service member stood in loco parentis, and who is of any age. (§825.127(b)(1))
A parent of a covered service member is any biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the covered service member. (§825.127(b)(2))

The next-of-kin of a covered service member is the nearest blood relative other than the spouse, parent, son, or daughter, in the following order of priority:

- Blood relatives who have been granted legal custody,
- Brothers and sisters,
- grandparents,
- aunts and uncles, and
- first cousins.

However, the covered service member can specifically designate in writing another blood relative for purposes of military caregiver leave, which person shall be deemed to be the only "next of kin" eligible for FMLA military caregiver leave. When no such designation is made and there are multiple family members with the same level of relationship to the covered service member, all such family members are considered the covered service member's next of kin and may take FMLA leave to provide care to the covered service member. (§825.127(b)(3))

An employer is permitted to require an employee to provide confirmation of family relationship to the covered service member. (§825.127(b)(3))

**Amount of Leave**

An eligible employee is entitled to 26 workweeks of FMLA leave to care for a covered service member with a serious injury or illness during a “single 12-month period.” (§825.127(c))

The “single 12-month period” begins on the first day the eligible employee takes FMLA leave to care for a covered service member and ends 12 months after that date, regardless of the method the employer otherwise uses to determine the employee’s entitlement for other FMLA-qualifying leave. If an eligible employee does not use all 26 workweeks of available leave during this 12-month period, the remainder is forfeited. (§825.127(c)(3))

The leave is available on a per-covered-service member, per-injury basis, so that if the employee becomes entitled to military caregiver leave under the FMLA with respect to a different family member, the employee is entitled to a new 26 workweeks of leave during a separate "single 12-month period." Similarly, if the covered service member incurs a new illness or injury subsequent to the original one, a new 26 workweeks is
available to the employee. Nevertheless, the employee is limited to taking no more than 26 workweeks of leave in each single 12-month period. (§825.127(c)(2))

The 26 workweeks of leave is further limited by the rule that this amount of leave is decreased by FMLA leave taken by the employee for other qualifying reasons. That is, 26 workweeks of FMLA leave is available for caring for a covered service member and for all other FMLA reasons. For example, if an employee takes 10 weeks of FMLA leave to care for a newborn child, that employee would only be able to take 16 weeks of FMLA leave to care for a covered service member. (§825.127(c)(3))

The final regulations provide that it is the employer's responsibility to designate FMLA leave as leave to care for a covered service member if those circumstances exist. Sometimes, FMLA leave to care for a covered service member will also constitute leave to care for a spouse parent or child with a serious health condition. The employer cannot designate and count such leave both ways at the same time. (§825.127(d)(3))

The final regulations also limit leave to care for a covered service member where it is taken by both a husband and wife who are employed by the same employer. In such instances, the husband and wife would have a combined total of 26 workweeks of leave during the “single 12-month period.” (§825.127(d))

Leave to care for a covered service member is available as medically necessary and may be taken intermittently. (§825.202(b)) As with other types of serious health conditions, the “needed to care for” standard by which an employee may take military caregiver leave includes situations in which providing psychological comfort would be beneficial where the service member is receiving inpatient or home care. (§825.124(a))

Employee Notice Requirements

The employee must provide at least 30 days advance notice if the employee wishes to take FMLA leave to care for a covered service member with a serious injury or illness. However, if 30 days notice is not practicable, notice must be given as soon as it is practicable to do so. (§825.302(a))

The employer may require an employee to obtain a certification completed by an authorized health care provider of the covered service member. Any one of the following health care providers may complete such a certification:

- A United States Department of Defense ("DOD") health care provider;
- A United States Department of Veterans Affairs ("VA") health care provider;
- A DOD TRICARE network authorized private health care provider; or
- A DOD non-network TRICARE authorized private health care provider.
The final regulations detail the information that the employer may obtain from the authorized health care provider. The certification must be sufficient to support the need for leave and therefore should contain such medical facts as are necessary to establish that the covered service member is medically unfit to perform the duties of his or her office, grade, rank or rating. If the employee is seeking intermittent leave, the medical certification should establish that there is a medical necessity for such periodic care and the certification should include an estimate of the frequency and duration of the required absence. (§825.310(b))

The Department of Labor has developed an optional form (WH-385) for employees' use in obtaining certification that meets these requirements. Any other form containing the same basic information may be used by the employer, but no information may be required beyond that specified in the regulations. Furthermore, second and third opinions otherwise available to employers with respect to other forms of FMLA leave are not available concerning this military caregiver leave. Finally re-certifications that are otherwise available with respect to other forms of FMLA leave are not permitted for leave to care for a covered service member. (§825.310(d))

What to do

Employers may wish to do the following:

- familiarize themselves with the new regulations and in particular those pertaining to military family leave,
- review and refine existing FMLA policies, procedures and forms to bring them into compliance with the final FMLA regulations by the January 16, 2009 effective date,
- develop a compliance strategy which includes taking advantage of changes beneficial to employers while minimizing the negative impact of the expansion of FMLA rights in favor of employees, and
- review other employment-policies that may limit your ability to take advantage of certain rights for employers that the final regulations provide.

For more information on how to prepare for and manage the final regulations, contact Amy D. Hartwig at adhartwig@michaelbest.com or Charles P. Stevens at cpstevens@michaelbest.com.

For more information on these FMLA regulations, please click here to attend our free audio conference, which will be held on November 25th:

For the full-text of these regulations, please click here.