



MEMORANDUM

January 16, 2009

TO: CLIENTS AND FRIENDS OF STOEL RIVES

FROM: THE STOEL RIVES LABOR AND EMPLOYMENT GROUP

RE: Summary of New FMLA Regulations Effective January 16, 2009

On November 17, 2008, the U.S. Department of Labor (“DOL”) issued its final revised regulations to the Family and Medical Leave Act of 1993 (“FMLA”), marking the first major overhaul since the enactment of the FMLA 15 years ago. The revised regulations go into effect on January 16, 2009.

The revised regulations include many changes to the existing FMLA regulations, the most significant of which are the notice and medical certification requirements. Key changes include rules on employer notice requirements, employee notice requirements, and medical certifications and recertifications.

- **Employee Notice Requirements**

The revised regulations expand employees’ responsibilities to provide notice of their need for leave. Notice of the need for unforeseeable leave must be provided as soon as practicable under the circumstances. Foreseeable leave requires at least 30 days’ advance notice or as soon as practicable, ordinarily the same or next business day, when learning of the need for leave. An employee requesting leave must sufficiently explain the reasons for the needed leave and provide enough information so an employer can determine whether the leave is FMLA-qualifying. Simply calling in sick without additional information is not enough and will not trigger an employer’s obligations under the FMLA. An employer may require employees to comply with its usual and customary notice/procedure requirements for requesting leave, absent unusual circumstances. Failure to explain or respond to reasonable inquiries can lead to a denial of leave.

- **Employer Notice Requirements**

The revised regulations separate an employer’s notice obligations into three categories: general notice, eligibility notice and designation notice. With respect to general notice, employers must continue to post general information about the FMLA. If employees have access to a computer, electronic posting can satisfy this requirement. Employers also must

distribute a copy of this notice to each employee either by including it in the employee handbook (by providing a link to it on the employer's intranet, as an appendix to the handbook or by incorporating it into the employer's FMLA policy) or, if the employer does not have a handbook, by providing it to new employees at the time of hire. The DOL has revised the general notice form, Form WH-1420, to replace the current form.

Employers must continue to communicate eligibility status to employees by providing eligibility notice within five business days (currently two business days) after the employee either requests leave or the employer knows that the employee's leave may be protected by the FMLA. The notice must specify whether leave is still available in the applicable 12-month period and, if the employee is not eligible or has no FMLA leave available, must indicate the reason(s) why.

The notice also must inform eligible employees of their FMLA rights and responsibilities (*i.e.*, medical and fitness-for-duty certification requirements, requiring substitution of paid leave, maintaining benefits and job reinstatement rights). This information can be communicated to employees in Part B of the DOL's new Notice of Eligibility and Rights & Responsibilities, Form WH-381.

Within five business days (currently two business days) of determining whether leave is protected, an employer must inform the employee whether the leave will be designated as FMLA leave or explain what additional information is needed to make the determination. The communication must state the amount of time being designated as FMLA leave (or if not designated as FMLA leave, then the reason why). If the exact amount of leave is uncertain, the employer must inform the employee of the right to request the amount of FMLA leave that will be counted against the FMLA entitlement once in a 30-day period if leave is taken in the 30-day period. The Designation Notice must include the employee's essential job functions if the employer intends to require that the physician address such information in a fitness-for-duty certification. The DOL has developed a Designation Notice, Form WH-382, for optional employer use.

Failure to comply with applicable notice requirements may constitute interference with, restraint of or denial of exercise of an employee's FMLA rights. Accordingly, an employer could be liable for money damages resulting from its failure to comply. Remedies include equitable relief, including employment, reinstatement or other appropriate relief.

- **Medical Certifications**

The revised changes to the medical certification provisions arm employers with additional ways to understand the extent of the employee's or family member's serious health condition. Employers must request medical certifications within five business days after receiving notice of the need for leave or, for unforeseen leave, within five business days after leave has begun. Employees have 15 calendar days to return the certification. A new medical

certification may be required annually for serious conditions lasting beyond a year. The DOL has developed two medical certification forms. One is for use by employees seeking leave for their own serious health condition (Form WH-380E), and the other is for use by employees seeking leave to care for a family member (Form WH-380F).

If an employee submits a medical certification that is incomplete or insufficient, the employer must provide an employee with an opportunity to cure the deficiencies. Employers must identify, in writing, the specific information needed to cure these deficiencies, and an employee has seven calendar days to provide the information. Employers may deny FMLA leave to employees who fail to cure identified deficiencies.

The revised regulations now allow an employer to directly contact an employee's health care provider ("HCP") to authenticate or clarify a medical certification. The following individuals may contact the HCP on the employer's behalf: the employer's HCP, a human resources professional, a leave administrator or a management official. An employee's direct supervisor, however, is prohibited from contacting an employee's HCP. When contacting an employee's HCP, employers cannot request more medical information than that requested on the medical certification form. For authentication, an employer may ask the HCP to verify that the provided information was completed and/or authorized by the HCP who signed it. To clarify information, an employer must comply with the Health Insurance Portability and Accountability Act's ("HIPAA") privacy requirements. Refusal to provide HIPAA consent may compromise an employee's FMLA rights if medical certifications are deficient.

- **Recertifications**

The revised regulations also address the frequency, timing and content of medical recertifications. Generally, an employer may request recertification every 30 days. If the period of incapacity exceeds 30 days, employers must wait until that period ends before requesting recertification. An employer may request a recertification at any time if an employee requests a leave extension, circumstances specified in the prior certification have changed or the employer receives information casting doubt upon the employee's stated reason for the absence. If a condition requires intermittent or reduced leave for periods exceeding six months, employers may request recertification every six months, in connection with an absence. When requesting a recertification, employers may provide HCPs with a record of the employee's absence pattern and ask whether such pattern is consistent with the serious health condition and the need for leave. Second and third medical opinions, however, are still not permitted with recertifications.

- **Fitness-for-Duty Certification**

An employer must advise an employee in the Designation Notice if a fitness-for-duty ("FFD") certification will be required before reinstatement. If an employer fails to provide such notice, an FFD certification cannot be required and return to work cannot be denied. The HCP may be required to verify the employee can perform the essential functions of the job if the

employee was so advised in the Designation Notice and the employee's essential job functions are listed in the notice (or a job description with the essential functions is attached). If an employee is on intermittent or reduced leave, an FFD certification may be required up to once every 30 days if there are reasonable safety concerns (as defined in the rules). Second and third opinions are prohibited in connection with an FFD certification. If the employee does not provide the FFD certification after receiving proper notice, the employee is not entitled to reinstatement.

- **Intermittent Leave**

Employers are no longer required to calculate intermittent leave in the shortest time increment it uses to track time for payroll purposes. An employer may track intermittent leave in the increments it uses to track other forms of leave, so long as such increment is not greater than one hour.

The revised regulations require that employees make a reasonable effort (as opposed to a "reasonable attempt") to avoid disrupting the employer's operations when scheduling leave. An employer can require that employees follow the employer's customary call-in procedures when taking unscheduled, intermittent leave. Failure to do so can result in a delay or denial of FMLA protections.

- **Military Family Leave**

The FMLA now provides two new leave entitlements: (1) Military Caregiver Leave (a.k.a. Covered Servicemember Leave) and (2) Qualifying Exigency Leave.

- 1. Military Caregiver Leave**

Effective January 28, 2008, the Military Caregiver Leave requirements entitle eligible employees 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. A "covered servicemember" is a current member of the regular armed forces, National Guard or Reserves who is undergoing medical treatment, recuperation or therapy, or is otherwise on the temporary disability list for a serious injury or illness incurred in the line of duty on active duty. The employee must be the spouse, parent, son, daughter or next of kin (as defined in the rules) of the covered servicemember to be eligible for the leave.

The leave year is based on a single 12-month period and begins with the first day the employee takes leave. Leave is applied on a per-covered-servicemember, per injury/illness basis. During the single 12-month period, the total leave taken for any purpose may not exceed 26 weeks. Such leave may be taken continuously, intermittently or on a reduced schedule.

Employees and employers are subject to the same notice requirements that apply to regular FMLA leave. An employer may request medical certification and certification of military status. Employers must designate leave as servicemember leave when leave qualifies under both this provision and the provision for leave to care for a family member with a serious health condition. The DOL has developed a separate certification form, Form WH-385, for optional employer use.

2. Qualifying Exigency Leave

The second 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 entitles an employee to take up to 12 workweeks of FMLA leave due to a qualifying exigency arising out of the fact that the employee's spouse, child or parent has been called to active duty. Exigency leave does not apply to family members of military members who are in the regular armed forces.

Under the rule, leave can be taken for the following "qualifying exigencies": (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 agreed to by the employer and employee. The need for the leave must be related to the active duty or call to active duty.

An employer's regular FMLA leave year applies to Qualifying Exigency Leave. An employer may require an employee seeking FMLA leave for this purpose to submit a certification. The DOL has drafted a certification of qualifying exigency for military family leave (Form WH-384) for an employer's optional use. In connection with the certification, an employer may ask for copies of the military member's orders, facts about the exigency, dates of the active duty service and date of commencement of exigency.

Given these changes, employers should revamp existing FMLA policies, procedures and forms to incorporate the new timing, notification and certification requirements. Employers also should retrain their human resources professionals, managers and supervisors and others who are responsible for implementing their FMLA policies on how to respond to employees who request leave that may be protected by the FMLA and how to evaluate whether that leave is covered.