

Expanded FMLA Leave Protection for Close Relatives of Service Members

by Amy S. Wilson



Employers should take steps to prepare themselves for significant changes to the Family and Medical Leave Act of 1993. On January 28, 2008, the National Defense Authorization Act of 2008 was signed into law, which has provided extended FMLA protection to certain relatives of uniformed service members.

This is the first expansion of the FMLA since its enactment in 1993 and it has been amended in two principal ways. The first provision is a leave to handle “exigencies” which provides up to 12 weeks of FMLA leave for a “qualifying exigency” arising out of a close family member’s call to active duty. The second provision is leave to care for a family member injured during military service and provides up to 26 weeks of leave. Both forms of military family leave may be taken intermittently or on a reduced leave schedule. The FMLA requirements for employee and employer eligibility, notice, certifications and job protections apply.

Recently, the Department of Labor (DOL) published a Notice of Proposed Rulemaking in the Federal Register, which provided some guidance on these new types of leaves. The proposed rules were open for public comment until April 11, 2008 and final rulemaking likely will not be concluded until the end of this year.

“Qualifying Exigency” Leave

On January 30, 2008, the DOL posted a notice on its website stating that the requirements to provide leave to deal with exigencies when a family member is called to active duty will not go into effect until final regulations are issued defining “qualifying exigency.” Once in effect, employees will be entitled to 12 weeks of leave due to a “qualifying exigency” which arises “out of the fact that the spouse, [child] or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces to support a contingency operation.” The 12 week “exigency” leave is part of the combined total of 12 weeks of FMLA leave available to employees in any 12-month period. However, DOL’s proposed regulations issued on February 11, 2008 did not propose a definition of “qualifying exigency.” Instead, it solicited comments on whether the following types of exigencies, as well as any others, should qualify: (1) making arrangements for child care; (2) making financial and legal arrangements to address the service member’s absence; (3) attending counseling related to the active duty of the service member; (4) attending official ceremonies or programs where the participation of the family member is requested by the military; (5) attending to farewell or arrival arrangements for a service member; and (6) attending to affairs caused by the missing status or death of a service member.

If leave is due to a “qualifying exigency,” the employer may require that the request be supported by certification issued in the manner as the DOL may prescribe in its regulations. The February 11th proposed regulations seek comment on various ques-

tions relating to certification, and include: (1) Who may issue a certification related to active duty or call to active duty status? Should anyone other than the Department of Defense provide a certification of the covered service member’s active duty or call to active duty status?; (2) Should an employee seeking FMLA leave due to a qualifying exigency provide certification of the qualifying exigency by statement or affidavit?; (3) Should an employer be permitted to clarify, authenticate or validate an active duty or call to active duty certification? If so, what limitations, if any, should be imposed on an employer’s ability to seek such clarification, authentication or validation for certifications?

Servicemember Family Leave

Servicemember Family Leave is leave providing up to 26 weeks to care for an injured family member. This type of leave became effective immediately and should now be included in all FMLA policies. Under this provision, an eligible employee who is the spouse, child, parent or “next of kin” of a “covered” service member may take up to 26 weeks of job-protected leave in “a single 12-month period” to care for the service member. “Next of kin” is defined as the “nearest blood relative of that individual. A “serious injury or illness” is limited to “an injury or illness incurred by the member in line of duty on active duty in the Armed Forces that may render the member medically unfit to perform the duties of the member’s office, grade, rank, or rating.” “Servicemember family leave” is combined with all other FMLA leaves, which allows an employee a combined total of 26

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NEW I-9 FORM NOW REQUIRED

by Heather L. Wilson



The U.S. Citizenship and Immigration Service recently announced that employers, including those in the construction industry, must begin to use a new Form I-9.

The Form I-9 helps to verify that individuals are authorized to work in the United States. Employers must complete a Form I-9 for every employee hired to perform labor or services in return for wages, hired after November 6, 1986. The requirement applies to all employers who employ, recruit or refer people for a fee, and those who employ anyone for domestic work in their private home on a regular basis. The Form I-9 is not required for individuals: 1) hired before November 7, 1986 who are continuing in their employment and have a reasonable expectation of employment at all times; 2) employed for casual domestic work in a private home on a sporadic, irregular or intermittent basis; 3) independent contractors; or 4) individuals who provide labor and are employed by a contractor providing contract services.

Significant Changes to Form I-9

The new revision removed five documents from List A. These removed documents established both identity and employment eligibility. They are:

- Certificate of United States Citizenship (Form N-560 or N-561);
- Certificate of Naturalization (Form N-550 or N-570);
- Alien Registration Receipt Card (Form I-151);
- Reentry Permit (Form I-327); and
- Refugee Travel Document (Form I-571).

The most recent version of the Employment Authorization Document (Form I-766) has been added to List A. The revised list now includes:

- U.S. Passport (unexpired or expired);
- Unexpired Permanent Resident Card

or Alien Registration Receipt Card (Form I-551);

- Unexpired foreign passport with a temporary I-551 stamp;
- Unexpired Employment Authorization Document that contains a photograph (Forms I-766, I-688, I-688A, I-688B); and
- Unexpired foreign passport with an unexpired Arrival-Departure Record (Form I-94) for nonimmigrant aliens authorized to work for a specific employer.

Penalties for Non-Compliance

Employers must take note of the Form I-9 changes because they face penalties for noncompliance. The Department of Homeland Security may impose penalties against employers who knowingly hire or knowingly continue to employ an unauthorized alien or fail to comply with the employment eligibility verification requirements. The DHS may issue a cease and desist order to the employer and impose significant civil money penalties depending on the number of offenses. Additionally, employers who are convicted of having engaged in a pattern or practice of knowingly hiring unauthorized aliens may face fines and/or six months imprisonment. Employers who fail to fully complete, retain and/or make available for inspection Form I-9 may also face civil money penalties.

Practical Tips for Employers to Ensure Compliance

Employers should do the following to make sure they comply with the Form I-9 requirements:

- Have employees complete Section 1 and 2 of the Form I-9 when they start to work, including signing and dating the form;
- If an employee accepts a job but will not start work for a month, the employee can complete the Form I-9 when they begin working;
- If the employee is unable to provide documentation at the time employ-

ment begins, allow the employee three business days from the start of employment to produce the required documentation;

“Employers must complete a Form I-9 for every employee hired to perform labor or services in return for wages, hired after November 6, 1986.”

- After receiving the required documentation, examine the documents and if they reasonably appear to be genuine and relate to the person presenting them, the employer must accept the documentation. To do otherwise could subject an employer to a discrimination claim. If the documents on their face do not appear to be genuine or relate to the person presenting them, the employer cannot accept them;
- Generally, if the employee fails to provide the required documents within three business days, the employer can terminate the employment.
- Employees must present original documents. The only exception is presenting a certified copy of a birth certificate; and
- Retain the Form I-9 for 3 years after the date the employee begins work or 1 year after the employee is terminated, whichever is later.

The new Form I-9 can be accessed at: <http://www.uscis.gov/i-9>. The revised Handbook for Employers can be found at www.uscis.gov/files/nativedocuments/m-274.pdf.

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Wellness Plan Benefits Must Meet HIPAA Non-Discrimination Rules

by Michael T. Bindner



Congress enacted the Health Insurance Portability and Accountability Act (HIPAA) in 1996. One HIPAA provision prohibits a group health plan or group health insurance issuer from (1) having eligibility requirements that discriminate on the basis of a health factor or (2) requiring any individual or their dependent to pay a premium or contribution greater than the premium or contribution for a similarly situated individual enrolled in the plan or group health insurance coverage based on a health factor. These prohibitions are contained in the Employee Retirement Income Security Act (ERISA), the Internal Revenue Code and the Public Health Service Act. A health factor can include health status, medical condition (both physical and mental illnesses), claims experience, receipt of health care, medical history, genetic information, evidence of insurability and disability.

HIPAA does not, however, prevent a plan from varying benefits, the premium or contribution for similarly situated individuals in a wellness program that satisfies the requirements described in final regulations issued by the Department of Labor (DOL) in 2006. These final regulations apply for plan years beginning on or after July 1, 2007. For calendar year plans, the new regulations became effective January 1, 2008.

The regulations permit rewards to individuals that are not contingent on the individual satisfying a standard related to a health factor if participation is made available to all similarly situated individuals. Examples in the regulations are as follows:

- (1) A program that reimburses the cost for memberships in a fitness center.
- (2) A diagnostic testing program that is paid regardless of outcome.
- (3) A program that encourages preventive care through the waiver of the co-payment or deductible requirement under a group health plan for the costs of, for example, prenatal care or well-baby

visits.

- (4) A program that provides a reimbursement for participation in smoking cessation programs that is paid regardless of outcome.
- (5) A program that provides a reward to employees for attending a monthly health education seminar.

Additionally, the regulations permit rewards that are contingent on an individual satisfying a standard related to a health factor if the following five requirements are met:

- (1) The reward for the wellness program, coupled with the reward for other wellness programs with respect to the plan that require satisfaction of a standard related to health factor, must not exceed 20 percent of the cost of employee-only coverage under the plan.
- (2) The program is reasonably designed to promote good health or prevent disease.
- (3) The program must allow individuals eligible for the program an opportunity to qualify for the reward at least once each year.
- (4) The reward is available to all similarly situated individuals.
- (5) The plan must disclose the availability of a reasonable alternative standard in all plan materials describing the terms of the program.

The following example from the regulations illustrates how a wellness program can be designed to comply with HIPAA:

In conjunction with an annual open enrollment period, a group health plan provides a form for participants to certify that they have not used tobacco products in the preceding twelve months. Participants who do not provide the certification are assessed a surcharge that is twenty percent (20%) of the cost of employee-only coverage. However, all plan materials describing the terms of the wellness program include a statement addressing concerns if it is unreasonably difficult to meet the requirements of the program due to a health factor.

It is unreasonably difficult for Individual F to stop smoking cigarettes due to an addiction to nicotine (a medical condition). The plan accommodates F by requiring F to participate in a smoking cessation program to avoid the surcharge. F can avoid the surcharge for as long as F participates in the program, regardless of whether F stops smoking (as long as F continues to be addicted to nicotine).

In this example, the premium surcharge is permissible as a wellness program. First, the program complies with the limits on rewards under a program. Second, it is reasonably designed to promote good health or prevent disease. Third, individuals eligible for the program are given the opportunity to qualify for the reward at least once per year. Fourth, the reward under the program is available to all similarly situated individuals because it accommodates individuals for whom it is unreasonably difficult due to a medical condition (or for whom it is medically inadvisable to attempt) to quit using tobacco products, by providing a reasonable alternative standard. Fifth, the plan discloses in all materials describing its terms the availability of a reasonable alternative standard.

The Internal Revenue Code imposes a maximum penalty of \$100 per day for failure to comply with HIPAA, although there are exceptions and limitations that may be applicable in some circumstances. In addition, a participant could sue a plan or employer under the terms of ERISA to prevent the use of a plan provision that violates the HIPAA provisions described above.

The Department of Labor issued a Field Assistance Bulletin (No. 2008-02) in February, 2008 that describes the types of programs offered by a group health plan that must comply with the regulations and how to determine if a program is in compliance in an easy-to-follow checklist form. The Bulletin is available at www.dol.gov/ebsa/regs/fab2008-2.html.♦

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weeks of leave during a single 12-month period.

Questions still exist regarding the provision for 26 weeks of leave in a single 12-month period, such as: (1) Should the 12-month period be calculated from the date of the service member's injury, the date of the determination that the service member has a serious injury or the date on which an eligible employee is needed to care for a seriously injured service member?; (2) What is the meaning of "a single 12-month period"? Is it a one-time entitlement or do the 26 work weeks of leave renew each 12-month period?

Other Highlights from the DOL's February 11, 2008 Proposed Rulemaking

The DOL's proposed rules are the first significant update to the FMLA since the federal regulations were implemented in 1994. The DOL issued a "Request for Information" in December 2006 and received numerous comments. The comments included concerns regarding unscheduled intermittent leave, employee notice, interaction between the FMLA and the Americans with Disabilities Act, the definition of serious health condition, and medical certification. The proposed rules address some of these concerns.

The proposed rules include changes involving the medical certification process. Under the proposed rules,

employers would now be allowed to contact medical providers directly for purposes of authenticating or clarifying a certification form. Currently, an employer may not contact the employee's physician directly and employers are required to hire their own medical providers to ask questions about medical certifications. The rules would also permit employers to request annual recertification for conditions lasting more than a year and a semi-annual recertification for conditions described as "lifetime," "indefinite," or "unknown."

The current regulations prevent employers from denying a bonus or award to employees simply because they took an FMLA leave of absence. The DOL has proposed a change that would now allow employers to disqualify an employee from a bonus or award that is predicated on the achievement of a goal, where the goal is not reached as a result of an FMLA leave of absence.

The DOL's proposed rules also clarify that an employer and employee may voluntarily agree to the settlement of past FMLA claims without the permission of the DOL or a court. However, the prohibition of waivers on prospective FMLA claims remains intact.

Another area of proposed rulemaking includes the definition of "serious health condition." The proposed rules would require employees who suffer from a chronic health condition to demonstrate that they have seen a doctor at least twice a year rather than on a "periodic" basis. In addition, a serious

health condition involving three consecutive days of incapacity must include two separate visits to a medical provider within 30 days of the incapacity.

Practical Tips for Employers

While awaiting final regulations, employers should familiarize themselves with the new military family leave options available to their employees under the NDAA amendment, notify employees of the new types of leave, and revise leave policies to reflect the changes in the FMLA.♦

Labor & Employment Group Welcomes New Attorney

Suzannah Wilson Overholt has recently joined Locke Reynolds as a senior counsel practicing in the Labor and Employment Group. She has extensive experience representing employers in the public and private sector and has represented clients in numerous jury and bench trials in state and federal court. Suzannah's experience also includes advising and developing personnel practices and procedures, conducting in-house investigation of discrimination and harassment complaints, negotiating labor contracts and representing management in labor arbitrations. She has also assisted in managing public relations strategies regarding litigation, employment and labor issues.

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