Foster Garvey

New Federal Regulations Implementing the Family and Medical Leave Act, Effective January 16, 2009

Legal Alert
December 3, 2008

Garvey Schubert Barer Legal Update, December 3, 2008.

On November 17, 2008, the Department of Labor issued new Final Regulations implementing the Family and Medical Leave Act of 1993 (FMLA). Among other areas, these regulations change the requirements concerning notice and certification of FMLA leave, the definition of a "serious health condition," and compliance with customary leave procedures. They also enact new regulations implementing recent FMLA amendments to care for injured military servicemembers and to provide certain support to reserve or retired military servicemembers who have been called to active duty in support of military or emergency operations.

Among other changes and additions, the new regulations:

- Require employees to give notice of unforeseeable FMLA leave on the same or next business day.
- Give an employer five business days to notify an employee of FMLA eligibility and to designate FMLA leave, rather than two.
- Provide some clarity on the timing and extent of medical treatment that permits FMLA leave. For example, treatment as a result of an incapacity must now occur within the first seven days of the first day of the incapacity. When treatment two or more times is the basis for leave, those treatments must now occur within 30 days after the first day of an incapacity. In addition, for leave based on a chronic serious health condition, periodic treatments must now occur at least twice a year.
- Generally, give employers the right to contact an employee's physician directly to authenticate a medical certification for FMLA leave after an employee has had an opportunity to cure a deficient medical certification.
- Require, absent unusual circumstances, that employees comply with an employer's usual and customary procedures for requesting leave, including notice for taking paid leave and using paid leave in whole day increments.
- Allow bonuses and incentive awards based on attendance and other productivity goals to take into account FMLA leave, so long as the policies are applied non-discriminatorily with respect to all forms of leave.
- Provide that employment preceding a break in service of seven years or more does not generally need to be included when calculating whether an employee is FMLA eligible.

Provide some additional clarity on the scheduling and recording of intermittent leave.

Provide detailed implementing regulations for the recently enacted FMLA leave related to injured military servicemembers and reserve or retired military servicemembers who have been called to active duty.

Garvey Schubert Barer is offering a free training seminar on January 7 explaining the new regulations and recommending appropriate HR process changes. Although the new regulations do not take effect until January 16, 2009, they will require changes to your procedures for identifying, processing, calculating, and communicating with your employees concerning FMLA leave. For example, certain regulations will require or permit you to implement amended and new leave policies, leave notification forms, letters and leave certifications for employees and their health care providers, job descriptions, lists of essential job functions, and attendance policies and rewards.

Other Updates:

New ADA Amendments

President Bush recently signed the ADA Amendment Act which will go into effect on January 1, 2009. Among other things, this law significantly broadens the definition of disability under federal law and eliminates the mitigating factors defense. Since these changes are already the law in Washington State, they should have minimal impact on most Washington employers.

Special Notice to Employers of Non-Resident Employees Working in California

On November 10, 2008, the Ninth Circuit Court of appeals held that the California Labor Code applies to work performed in California by employees who are not residents of that state. Consequently, the employees in that class action were awarded overtime for their work performed in California. It is likely that other non-overtime provisions of the California Labor Code will also apply to non-residents performing work in California.