



NO. 89 — November 2008

## Heads Up! DOL Issues New FMLA Regulations

*By Attorneys Thomas R. Revnew & Robin N. Kelleher*

On November 17, 2008, the Department of Labor issued revisions to the Family and Medical Leave Act regulations, marking the first update to the Act since its passage in 1993. The new regulations, which will become effective January 16, 2009, grant new leave rights for family members of military personnel and also clarify certain definitions and responsibilities of employers and employees. The following is an overview of some of the more important changes to the regulations.

**Military Caregiver Leave.** The most significant changes to the Regulations grant new leave rights for family members of military personnel. Under the military caregiver provision (which actually went into effect upon enactment of the National Defense Authorization Act in January 2008), eligible employees are entitled to up to 26 weeks of unpaid leave to care for service members with a serious illness or injury incurred while in the line of duty. Family members who may be eligible for this leave include the spouse, son, daughter, parent, or “next of kin” of the servicemember. “Next of kin” includes blood relatives with legal custody of the servicemember, brothers and sisters, grandparents, aunts and uncles, and first cousins.

**Qualified Exigency Leave.** This military leave is for families to attend to personal and business affairs of National Guard and/or Reserve members who are on active duty or being called up to active duty. Under this provision, the eligible spouse, son, daughter or parent of a servicemember must be granted up to 12 weeks of unpaid leave for qualifying “exigencies.” These exigencies include short-notice deployment, military events and related activities, childcare and school activities, financial and legal arrangements, counseling, rest and recuperation, post-deployment activities, and other activities that the employers and employees agree upon. This provision does not go into effect until the effective date of the regulations, January 16, 2009.

**Help In Defining “Serious Health Condition.”** The new regulations also augment the definition for “continuing treatment” of a “serious health condition.” If the employee’s medical condition involves three consecutive days of incapacity plus two visits to a healthcare provider, the new

Attend a Working Session on the Employee Free Choice Act (EFCA) and other proposed employer related statutes.

Tuesday, December 9, 2008

7:45—10:30 a.m.

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provision provides that the two visits must occur within 30 days of the start of the period of incapacity and the first visit must be within 7 days of the first day of incapacity. If the employee is asserting a serious health condition because of three days of incapacity, treatment by a health care provider at least once, and a regimen of continuing treatment under supervision of a health care provider, the new rules clarify that the treatment must be in person and within 7 days of the first day of incapacity. To meet the definition of a chronic serious health condition, the employee must make at least two visits to a health care provider within one year

**Beefing Up Employee Notice Requirements.** Under the new regulations, if FMLA leave requested by the employee is unforeseeable, the employee must comply with the employer's usual and customary notice requirements. (The old rule permitted the employee up to 2 days to give notice to the employer of need for the leave).

**Relaxing Employer Notice Requirements.** Employers are now permitted 5 (rather than 2) business days in which to notify the employee that his/her leave is designated as FMLA leave, and to provide notice to the employee that he/she is eligible for such leave.

**Changes To Employer Certification Rights & Limitations.** Under the new rules, the employer may contact the employee's health care provider directly regarding his/her medical certification for clarification and authentication purposes (but not for additional information). However, employers are limited to using a health care provider, a human resources professional, a leave administrator, or a management official for such contact. The employee's direct supervisor may not, under any circumstances, contact the employee's health care provider.

### **But Can You Perform The Essential Functions?**

Employers are permitted, under the updated regulations, to require employees to provide "fitness for duty" certifications which include addressing the employee's ability to perform the essential functions of the job – *if* the employer provides the employee with a list of his/her essential job functions

at the same time the employer provides the employee with the required "designation notice." The employer must also state in the "designation notice" that the certification must address the employee's ability to perform the essential job functions. Employers may also require "fitness for duty" certifications once every 30 days for employees on intermittent leave, if there are safety concerns regarding the employee's ability to perform his/her duties.

**Implementing Ragsdale.** The new regulations provide that the employer may retroactively designate leave as FMLA leave if the employer's failure to timely make the designation does not cause harm or injury to the employee. Under the old regulations, an employer who did not timely designate FLMA leave was not permitted to count the leave taken before the designation, thereby allowing the employee to take more than 12 weeks of FMLA leave. This rule was addressed and declared invalid in the *Ragsdale* decision.

**Yes, They Can Waive (Some Of) Those Rights.** The new regulations also provide that employees may, pursuant to a settlement agreement or release, waive FMLA rights based on past employer conduct without the approval of DOL or a court. However, employees may not waive prospective FMLA rights.

These provisions are only a sampling of the changes that employers must now become familiar with. Employers who are covered by the FMLA should plan to make all necessary changes to handbooks and other policy materials, as well as human resource practices, to ensure compliance with the new regulations. Please call the authors or any other Seaton, Beck & Peters lawyer at 952-896-1700 with questions or to request help in making the changes.

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Recommended for Business Owners, Senior-level Managers,  
General Counsel and Senior Human Resources & Labor Relations Executives

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***Tuesday, December 9, 2008***  
***7:00 – 7:45 a.m. Check-in & Continental Breakfast***  
***7:45 - 10:30 a.m. Working Session***  
***Sheraton Hotel, Bloomington Minnesota***

EFCA, the “card check” bill, abolishes secret ballot elections for union representation and provides for mandatory arbitrator-imposed labor agreements if no agreement is reached in 120 days. A dozen other proposed statutes will impose new requirements, penalties and liabilities for employers related to employee compensation, scheduling, benefits, leave, safety, government contracting, hire, discipline, termination and operations.

The cards are being collected by unions right now and these laws are being prepared right now for introduction as soon as President-Elect Obama is inaugurated and the new Democratic dominated House and Senate convene. Some may even be introduced earlier in an “Auto Bailout” Special Session.

Attend our Working Session on these legal changes so you are prepared for the challenges of the new legal landscape for all employers. The Session will be conducted by Attorneys Doug Seaton and Greg Peters of the Minneapolis firm of Seaton, Beck & Peters, P.A. and Attorney Mike Sherrard of the Sherrard Kuzz firm of Toronto, Canada, who currently represents employers under EFCA-like laws in several Canadian provinces.

To reserve a space, please fill out the reservation form below and fax it to **(952) 896-1704**, send us an email at [firm@seatonlaw.com](mailto:firm@seatonlaw.com) or complete our online registration at [www.seatonlaw.com](http://www.seatonlaw.com). Space is limited, so please respond quickly!

Registration fee is \$25.00 per person, payable in advance or at the door. Sorry, no credit cards.

**Please register me for the December 9, 2008 Seminar**

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