



## MEMBER ALERT

### ISSUES ASSOCIATED WITH THE NEW FMLA REGULATIONS

On Friday, January 16, 2009, new Family Medical Leave Act (“FMLA”) regulations go into effect. Articles and alerts have been published regarding the new regulations. However, many of these articles fail to address the interrelationship of the new regulations with the rights and obligations imposed by the California Family Rights Act (“CFRA”) or they fail to address the question of whether the new regulations are properly considered incorporated into the CFRA,<sup>1</sup> creating questions or conflicts as to the applicable governing law. Until these issues are clarified, hopefully through further communication from California regulators, Members should carefully evaluate each leave request, reaching out for assistance or guidance with respect to questionable circumstances or leave requests, to best ensure that they are acting in accordance with the law.

#### CHANGES IN FMLA REGULATIONS

Because of the nature and complexity of the new FMLA regulations, Members should review the new regulations and interpretation materials, potentially posting or distributing the \*\* materials to employees.

- DOL informational links: <http://www.dol.gov/esa/whd/fmla/finalrule.htm>
- \*\* DOL Summary Fact Sheet: <http://www.dol.gov/esa/whd/fmla/finalrule/factsheet.pdf>
- \*\* New military FMLA leave summary: <http://www.dol.gov/esa/whd/regs/compliance/whdfs28a.pdf>
- \*\* New non-military FMLA leave summary: <http://www.dol.gov/esa/whd/fmla/finalrule/whdfs28.pdf>
- General background: <http://www.dol.gov/esa/whd/FMLA2007FederalRegisterNotice/07-3102.pdf>

#### SIGNIFICANT FMLA REGULATORY CHANGES

1. Employer Notice Obligations. New employees must be notified in writing of their FMLA rights at the time of hire through a personnel handbook, eligibility notice, or similar written document. However, the time period for notifying an employee of his or her eligibility has been increased to five days, although employers must provide employees with more specific written notice regarding the response or analysis of an FMLA request. (agreed time off, challenges to medical certifications, etc.)

2. Employee Notice/Employer Inquiry. An employee need not expressly mention or assert his/her rights under CFRA/FMLA, but he/she must at least verbally provide the Member with facts advising the Member of a need/potential need for FMLA/CFRA-qualifying leave, including the stated basis for leave (personal health condition, health condition of a child, etc.) and the anticipated timing and duration of the leave. When the Member is advised of such facts, it should reasonably inquire into the question of whether FMLA/CFRA leave is being sought and to obtain necessary details support the basis for the request and its expected duration.

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<sup>1</sup> California Code of Regulations, Title 2, Section 7297.10 states that to extent the **1995** FMLA regulations are not inconsistent with CFRA, they are incorporated by reference into California law, making them fully applicable to California employers and employees. By using the specific date in the regulation (1995), it would not appear that the new FMLA regulations are considered incorporated by reference into CFRA, potentially creating materially different rights and obligations under State and Federal leave rights, obligations, and time periods. California regulators may later modify Section 7297.10 or issue a clarifying interpretative comment.

3. Joint Employer/Substitute Employees. (29 CFR § 825.106) Only employers with 50 or more employees are covered by the FMLA. Members who have “outsourced” positions to professional staffing agencies may still need to count such individuals in determining their compliance obligations. One exception is “professional employer organizations (“PEOs”), specialized companies who effectively “lease back” employees to perform certain functions. If the employees perform payroll or administrative benefits functions, they PEO may not need to count them as employees. In any event, the “primary” employer must still comply with all notice obligations.
4. Service Member Injury Leave. (29 CFR § 825.127) In addition to USERRA leave, spouses, sons, daughters, parents or “next of kin” are now entitled to up to 26-weeks of unpaid leave to care for a service member undergoing treatment, recuperation or rehabilitative therapy, or who is otherwise on temporary disability, for a serious injury or illness incurred during active duty that renders the service member medically unfit to perform the duties of his/her office, grade, rank or rating.
5. Military Exigency Leave. (29 CFR § 825.126) Employees are entitled to up to a total of 12-weeks of unpaid leave for exigent circumstances arising out of the employee’s spouse, son, daughter, or parent receipt of an active duty notice (including National Guard notifications), or notice of an impending call or order to active duty, in support of a contingency operation. Exigent circumstances allow the qualifying employee to address child care, school, financial, legal, counseling, military ceremony, or similar tasks or obligations.
6. Employee Eligibility. (29 CFR § 825.110) The new FMLA regulations retain the former requirement that an employee be employed for 12 months (which need not be continuous) and have worked 1,250 hours in the twelve month period prior to taking leave. However, they add a break in service exception, under which if an employee has had a break in service of 7 years or more, the time prior to that break is not counted towards the twelve months of employment, unless the break was due to (1) the employee performing military service; or (2) a period of approved absences or unpaid leave, where a written agreement or collective bargaining agreement exists concerning the employers' intent to rehire the employee. In addition, employees who take military leave must be credited for the hours they would have worked but for fulfilling their military service obligations. This "credit" applies to both the 12-month and 1250-hour eligibility requirements.
7. Notice of Absence. While the new FMLA regulations require the employee to follow the Member’s usual and customary call-in procedures for reporting an absence, it is not clear whether these provisions will be considered in conflict with CFRA, and whether a right to provide “retroactive” notice of a need for leave still exists.
8. New Forms. The new FMLA regulations are accompanied by new medical certification forms (one for the employee's health condition, the other for use when an employee requests leave to care for a family member). Guidance from California regulators will be needed to confirm that these forms can also be used in compliance with CFRA leave requests. Because of the enhanced obligations of employers under the new FMLA regulations, employers asserting that a medical certification is incomplete or insufficient must address the concern in writing, with the employee then given at least seven days to cure the stated deficiency. If an employee does not cure the deficiency, the employer may deny FMLA leave.
9. Access to Health Care Provider. Under the new FMLA regulations, a Member receiving written authorization from an employee to contact his/her health care provider can do so in order to clarify or authenticate a medical certification, although the communication must be made by an employee (generally an HR professional) who is not the immediate supervisor of the employee on leave/who is seeking leave. If the employee refuses to provide the authorization, leave may be denied. It is not clear whether CFRA rights can be addressed in keeping with this provision; instead, the employer may remain obligated to seek a “second opinion” at its own expense.
10. Light Duty Assignments. The new FMLA rules eliminate a provision of the former regulations allowing employers to count the time an employee was on light duty as FMLA leave. Instead, the employees' right to job restoration is "tolled" during a light duty assignment. If the light duty assignment ends before the employee is able to resume his or her regular job duties, the employee may utilize FMLA leave. This change may be significant because, in certain circumstances, the employer may have to provide job restoration beyond the twelve weeks normally permitted under the FMLA.