msk

new fmla regulations create significant challenges for california employers

MSK Client Alert

April 2009

practice areas

employment litigation & counseling

labor & employment

labor litigation & counseling

It is no secret that managing leaves of absence in California is challenging. While there have always been notable differences between the federal Family and Medical Leave Act ("FMLA") and California law, employers have learned to navigate through these differences to comply with both sets of laws.

California employers now need to recalibrate their navigation systems. The U.S. Department of Labor ("DOL") issued new regulations interpreting the FMLA, which became effective on January 16, 2009. The FMLA regulations attempt to clarify some of the confusing provisions from the original regulations published in 1995. For California employers, though, the new FMLA regulations create new challenges.

A primary reason for the new challenges is that the California Family Rights Act ("CFRA") regulations provide that employers can rely on the FMLA regulations *that were issued on January 6, 1995*, as long as those regulations are not inconsistent with California law. 2 Cal. Code of Regs. § 7297.10. Compounding the challenges, the California Fair Employment and Housing Commission has stated that it plans to revise the CFRA regulations, but not necessarily to comply with the new FMLA regulations.

In the meantime, California employers must be aware of their expanded notice and leave obligations under the FMLA and take appropriate action to comply. This includes updating personnel policies, employee handbooks, and administrative practices. Employers must also remember that the changes to the FMLA do not necessarily alter California employers' existing obligations under the CFRA. Accordingly, California employers' duties under FMLA and CFRA, respectively, may differ. Following are some highlights of the differences between the new FMLA regulations and the CFRA of which California employers should be especially aware.

Military Family Leaves

The National Defense Authorization Act ("NDAA") amended the FMLA to provide two new military family leaves. Under the first of these new leave entitlements, eligible employees who are family members of covered servicemembers are able to take up to
26 weeks of leave in a single 12-month period to care for family members injured while on active military duty. The new regulations clarify which family members are covered by the provision, how the "single 12-month period" is to be determined, and how military caregiver leave coordinates with other FMLA-qualifying leaves.

The second new military family leave entitlement allows eligible employees to take up to 12 weeks of FMLA leave a year to tend to "any qualifying exigency" arising from an immediate family member's actual or impending active military service. The DOL's new regulations address what constitutes a "qualifying exigency." Specifically, the regulations now provide that a "qualifying exigency" includes the following general categories: (1) short-notice deployment; (2) military events and related activities;
(3) child care 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 CFRA does not specifically provide for military family leave. Some leaves, such as to care for an injured or ill servicemember, are covered by CFRA if the family member is a CFRA-covered employee (i.e., a spouse, child, or parent). Other types of military family leaves are not covered by CFRA, such as leave due to a qualified exigency or to care for a next of kin. The differences between the FMLA and CFRA may mean that an employee is eligible for an additional 12 weeks of unpaid leave time under the CFRA even though the employee has already exhausted a full
12 weeks of unpaid leave for qualified exigency and/or military caregiver leave under the FMLA.

Additionally, California's military spouse leave law (Military & Veterans Code § 395.10) requires employers to provide eligible employees up to 10 days of leave while the military spouse is on leave from deployment. Some or all of this leave may run concurrently with qualified exigency leave under the FMLA.

Serious Health Condition

The new regulations retain the same FMLA basic definitions of "serious health condition," but now provide further guidance regarding some of those definitions. For example, the regulations address the definition of a serious health condition that requires an employee to be incapacitated for more than three calendar days plus "two visits to a health care provider." The regulations now require that the two visits must occur within thirty days of the beginning of the period of incapacity, and that the first visit to a healthcare provider must occur within seven days of the first day of incapacity.

Additionally, the new regulations provide that for chronic serious health conditions, the employee must visit a healthcare provider at least twice per year.

The CFRA specifically incorporates the definitions of serious health conditions contained in the 1995 FMLA regulations, which does not specify the time periods in which continuing treatment must take place or the frequency of periodic treatments for chronic conditions. As a result, some absences may qualify for CFRA leave but not FMLA leave, depending on the timing of treatments.

los angeles
t 310.312.2000
f 310.312.3100

new york
t 212.509.3900
f 212.509.7239

washington, dc
t 202.355.7900
f 202.355.7899

Employer Notice Obligations

The new regulations contain several specific notices covered employers must provide to employees. General notice about the FMLA must be provided to employees through a poster, and either an employee handbook/policy guide or notice upon hire, if the employer does not maintain a handbook/policy guide.

Employers must also provide, when appropriate, eligibility notices, rights and responsibilities notices, and designation notices. The new rule extends the time for employers to provide various notices from two business days to five business days.

Medical Certification

The FMLA and California law differ in what information an employer may request from health care providers and how to obtain the information.

The new FMLA regulations change and provide further guidance concerning the timing, content, and other aspects of the medical certification process. Regarding the timing of certification, employers now have five business days, instead of two, to request certification after an employee requests FMLA leave. These provisions are consistent with the CFRA.

The new FMLA regulations also provide that employers may request a new medical certification each leave year for conditions that last longer than a year (such as for employees requesting intermittent leave or a reduced work schedule). Under the CFRA, an employer may request a new certification only upon the expiration of the time period that the health care provider originally estimated for the leave. The CFRA does not provide that a new year gives the employer the opportunity to restart the certification process.

If an employer deems a medical certification incomplete or insufficient, the new FMLA regulations require the employer to designate in writing what specific information is missing and give the employee at least seven days to cure the deficiency. The CFRA does not contain a similar provision.

The new FMLA regulations permit an employer's human resources professional, leave administrator, or management official to contact the employee's health care provider directly, but only to clarify and authenticate medical certifications. The employee's direct supervisor is precluded from ever making such contacts. Given that California employees have greater rights of privacy than under federal law, California employers should not contact health care providers directly to verify a CFRA leave request.