The New FMLA Regulations

By Brad Adler and Mary Anne Ackourey
Freeman Mathis & Gary, LLP

I. Highlights Of New Regulations

On November 17, 2008, the Department of Labor ("DOL") issued new regulations interpreting the Family and Medical Leave Act of 1993, as amended ("FMLA"). These regulations became effective on January 16, 2009. As these new regulations modify the obligations imposed upon employers and employees, it will be important for employers to review and revise their policies and procedures for administering FMLA leaves in light of these new regulations.

Below is a summary of the more significant changes to the regulations:

- The definition of "continuing treatment by a healthcare provider" for purposes of a "serious health condition" has been modified to mandate in-person treatment and time limitations for such treatment.

- Covered employers now must post a general FMLA notice, even if they do not have any employees eligible for FMLA leave.

- Employers now must provide employees two types of notice when employees request FMLA leave: eligibility notice (either indicating that the employee is eligible for leave or explaining the reason the employee is not eligible) and designation notice (notifying the employee whether the leave will be designated and counted as FMLA leave as well as if paid leave will be required to be substituted for unpaid FMLA leave and if the employer will require a fitness-for-duty certification upon return from leave).

- Each time the eligibility notice is provided, employers now must provide employees a notice of rights and responsibilities detailing the expectations and obligations of the employee and explaining the consequences of a failure to meet these obligations.

- Eligible employees now are provided 12 weeks of unpaid leave for a qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on active duty (or has been notified of an impending call or order to active duty) in support of a contingency operation.

- Eligible employees now may take unpaid leave, or substitute appropriate paid leave if the employee has earned or accrued it, for up to 26 workweeks in a single 12-month period to care for a covered servicemember with a serious injury or illness.

- Employers may demand more detailed information from the employee's health care provider before returning the employee to work.

- New forms have been implemented to assist employers in providing FMLA leave, including forms for employee eligibility and rights and responsibilities, designation of leave, certification of qualifying exigency for military family leave, and certification of serious injury or illness of covered servicemember for military family leave.

- There now are separate medical certification forms for an employee's serious health condition and for a family member's serious health condition.

- Employees now explicitly are permitted to settle past FMLA claims without government approval.

Below is a detailed summary of the significant changes that have been implemented by the new regulations.

II. Definition Of Continuing Treatment By A Health Care Provider Modified

The DOL has modified the definition of "continuing treatment by a health care provider" for purposes of determining whether an individual has a serious health condition. In this regard, the regulations removed a physician's assistant from the list of acceptable health care providers who provide the treatment. 29 C.F.R. §§ 825.115(a)(1), (c)(1).

Also, the regulations now provide that, if an individual qualifies for continuing treatment due to incapacity for more than three consecutive calendar days and treatment two or more times by a health care provider, such treatment must occur within 30 days of the first day of incapacity, unless extenuating circumstances exist. The term "extenuating circumstances" means circumstances beyond an employee's control that prevent the follow-up visit from occurring as planned by the health-care provider, as determined based on the particular facts (for example, if a consecutive visit is necessary within 30 days, but the provider has no available appointments). The health care provider must determine whether additional treatment visits or a regimen of continuing treatment is necessary within the 30-day period. Id. § 825.115(a).

Further, if an individual qualifies for continuing treatment due to incapacity for more than three consecutive calendar days and treatment by a health care provider (either two or more times or at least one time that results in a regiment of continuing treatment), the treatment must be an in-person visit, and the first (or only) such in-person visit must occur within 7 days of the first day of incapacity. Id. § 825.115(a)(3).

III. Leave Related To Military Service

In addition to leave for a serious health condition or for the birth, adoption, or foster placement of a child, eligible employees now are permitted to take unpaid, job-protected leave under the FMLA for a "qualifying exigency" or to care for a covered servicemember with a serious injury or illness.

A. Leave Because Of A Qualifying Exigency

Eligible employees may take twelve weeks of FMLA leave because of a qualifying exigency when a covered military member (meaning the employee's spouse, son, daughter, or parent) is on active duty or call to active duty status in support of a contingency operation either as a member of the reserve components (such as the National Guard or Reserves) or as a retired member of the Regular Armed Forces or Reserve. An employee whose family member is on active duty or call to active duty status in support of a contingency operation as a member of the Regular Armed Forces is not eligible to take leave because of a qualifying exigency. Id. § 825.126(b)(3).

A military operation qualifies as a contingency operation if it: (i) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or (ii) results in the call or order to, or retention on, active duty of members of the uniformed services under Sections 688, 12301(a), 12302, 12304, 12305, or 12406 of Title 10 of the United States Code; Chapter 15 of Title 10 of the United States Code; or any other provision of law during a war or during a national emergency declared by the President or Congress. Id. § 825.126(b)(3).

The following circumstances are considered "qualifying exigencies" for purposes of this regulation:

- To address any issues arising from short-notice deployment (*i.e.*, a covered military member is notified of impending call or order to active duty in support of a contingency operation seven or less calendar days prior to the date of deployment);

- To attend a military event, such as an official ceremony or program related to the active duty or call to active duty of a covered military member, and to attend family support or assistance programs and informational briefings sponsored or promoted by the military or the Red Cross;

- To arrange for alternative childcare when the call to duty so requires for a covered child or ward; to provide childcare on an urgent immediate need basis, but not a routine, regular, everyday basis; or to enroll or transfer a covered child or ward to a new school or day care facility; and to attend meetings with staff at the school or daycare facility;

- To make or update financial or legal arrangements to address the covered military member's absence, or to act as the military member's representative before a federal, state, or local agency to obtain or arrange for military benefits while the military member is on active duty status;

- To attend counseling, provided by someone other than a health care provider, for oneself or the covered military member or a covered child or ward;

- To spend time with a covered military member on short-term, temporary, rest and recuperation leave during a period of deployment;

- To attend arrival ceremonies, reintegration briefings or events, and other official programs or ceremonies sponsored by the military, including to address issues that arise from the death of a covered military member while on active duty status; and

- For any other activities that the employer and employee agree qualify as an exigency and for which they can agree on the timing and duration of such leave.

Id. § 825.126(a).

B. Leave To Care For A Covered Servicemember

An eligible employee may take up to twenty-six (26) weeks of unpaid, job protected leave in a single 12-month period (measured beginning on the date the leave begins) to care for a covered servicemember who has incurred an injury or illness in the line of duty while on active duty in the Armed Forces. This leave applies to care for a current member of the Armed Forces, including a member of the National Guard or Reserves, or a member of the Armed Forces, the National Guard, or Reserves who is on the temporary disability retired list, who has a serious injury or illness incurred in the line of duty on active duty for which he or she is undergoing medical treatment, recuperation, or therapy; or otherwise outpatient status; or otherwise on the disability retired list. Id. § 825.127(a). A "serious injury or illness" means an injury or illness incurred by a covered servicemember in the line of duty that may render the servicemember medically unfit to perform the duties of his or her office, grade, rank or rating. Id. § 825.127(a)(1).

In order to take leave to care for a covered servicemember, the employee must be the spouse, son, daughter, or parent, or next of kin of a covered servicemember. Id. § 825.127(b). "Next of kin" means nearest blood relative, other than a covered spouse, parent, son or daughter, in the following order of priority: (1) blood relatives who have been granted legal custody of the servicemember; (2) brothers and sisters; (3) grandparents: (4) aunts and uncles and first cousins; unless, the covered servicemember has designated his or her nearest blood relative for purposes of military caregiver leave under the FMLA. Id. § 825.127(b)(3).

Leave to care for a covered servicemember applies on a per-covered-servicemember, per-injury basis. Therefore, an eligible employee may be entitled to more than one period of 26 workweeks of leave if the leave is to care for a different covered servicemember or for the same servicemember with a different serious injury or illness, except that no more than 26 workweeks of leave may be taken within any single 12-month period. Id. § 825.127(c)(2).

An eligible employee is entitled to a combined total of 26 workweeks of leave for any FMLA-qualifying reason during the single 12-month period the employer has elected, provided that no more than 12 weeks of leave may be taken for a serious health condition or for the birth,

adoption, or foster placement of a child. For example, during the single 12-month period, an eligible employee may take 16 weeks of FMLA leave to care for a covered servicemember and 10 weeks of FMLA leave to care for a newborn child. However, no more than 12 weeks may be taken to care for the newborn during the single 12-month period, even if fewer than 14 weeks are taken to care for a covered servicemember.

Leave that qualifies as both leave to care for a covered servicemember and leave to care for a family member with a serious health condition during a single 12-month period may not be designated and counted as both types of leave. Such leave must be designated first as leave to care for a covered servicemember.

If a husband and wife are both eligible for FMLA leave and are employed by the same employer, they may be limited to a combined total of 26 workweeks of leave during the single 12-month period to care for a serious illness or injury of a covered servicemember.

IV. Employer Notice Requirements

A. General Notice

Under the new regulations, every employer covered by the FMLA, regardless of whether the employer has any FMLA-eligible employees, must post a notice in a conspicuous place on its premises explaining the Act's provisions and providing information concerning the procedures for filing complaints of violations of the Act. Id. § 825.300(a)(1). The notice should be placed where it can be seen by employees and applicants for employment. This notice may be posted electronically, as long as it meets all other requirements. If an employer violates the posting requirement, it may be assessed a penalty of up to $110 per offense. Id. § 825.300(a)(1).

This notice must be posted by all covered employers, whether or not they have any eligible employees. Id. § 825.300(a)(2). If a covered employer has any eligible employees, then the employer shall provide the notice to each employee individually, either in a handbook or other written guidance. This can be achieved by distributing a copy of the FMLA notice to each new employee upon hiring, and may be done electronically. Id. § 825.300(a)(3). If a substantial portion of the employer's workforce is not literate in English, the notice must be provided in the language which the employees are literate. Id. § 825.300(a)(4). The DOL has developed a form notice that satisfies this requirement (Publication WH 1420).

B. Eligibility Notice

When an employee requests FMLA leave, or when an employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason, the employer now must provide two distinct types of notice to the employee: an eligibility notice and a designation notice (discussed below). With respect to the eligibility notice, the employer must notify the employee of the employee's eligibility to take FMLA leave within 5 business days of the request for leave (or the time the employer learns the leave may be covered by the FMLA), absent extenuating circumstances. Id. § 825.300(b)(1). Whether an employee is eligible, and whether eligibility notice must be provided, is to be determined at the commencement of the first instance of leave

for each FMLA qualifying reason in the applicable 12 month period. Id. § 825.300(b)(1). The eligibility notice must inform the employee if they are eligible for FMLA leave, and if they are not, the notice must provide at least one reason why the employee is not eligible. Notification of eligibility may be oral or in writing. The DOL has issued a form Notice of Eligibility Rights and Responsibilities under the FMLA (Form WH-381 – Part A).

If, at the time an employee provides notice of a subsequent need for FMLA leave during the applicable 12-month period due to a different FMLA-qualifying reason, and the employee's eligibility status has not changed, no additional eligibility notice is required. If, however, the employee's eligibility status has changed (for example, if the employee has worked less than 1,250 hours of service for the employer in the 12 months preceding commencement of leave for the subsequent qualifying reason or the size of the workforce at the worksite has dropped below 50 employees), the employer must notify the employee of the change in eligibility status within five business days, absent extenuating circumstances. Id. § 825.300(b)(3).

C. Rights And Responsibilities Notice

Along with the eligibility notice discussed above, employers now must provide employees with written notice detailing the specific expectations and obligations of the employee, and explaining any consequences of a failure to meet these obligations. This notice must be translated if a substantial portion of the employer's workforce is not literate in English. Id. § 825.300(c)(1). If leave already has begun, the notice must be mailed to the employee's address of record.

This notice should include: (1) that the leave may be designated and counted against the employee's annual FMLA leave entitlement if qualifying, and the applicable 12 month period; (2) any certification requirements; (3) the employee's right to substitute paid leave, whether the employer will require substitution of paid leave, the conditions related to any substitution, and the employee's entitlement to take unpaid FMLA leave if the employee does not meet the conditions for paid leave; (4) any requirement that the employee pay premium payments to maintain health benefits, and arrangements for making such payments, and consequences associated with a failure to make such payments; (5) whether the employee is a "key employee" and if so, that restoration may potentially be denied following FMLA leave; (6) the employee's right to maintain benefits during FMLA leave and restoration to the same or equivalent position upon return; and (7) the employee's potential liability for health insurance premiums paid by the employer during the employee's unpaid FMLA leave if the employee does not return. Id. § 825.300(c).

The notice also may include other information, such as whether the employer will require periodic reports from the employee's status and intent to return to work. If the information in this notice changes, the employer must inform the employee within 5 days of the employers receipt of the employees need for leave following the change, and shall reference the prior notice and all changes that were made. This notice may be distributed electronically if it meets all of the above requirements. Id. § 825.300(c)(6). The DOL has issued a form Rights and Responsibilities Notice (Form WH-381 – Part B).

D. Designation Notice

Once an employer has enough information to determine if the leave qualifies as FMLA leave (for example, if the employee has provided a certification), the employer now must notify the employee within 5 days if the leave will be designated as FMLA leave. The employer only must provide one designation notice for each qualifying reason per 12-month period. If the employer determines that the employee does not qualify for FMLA leave, it must notify the employee of such a determination. Id. § 825.300(d)(1). If the employer has enough information to designate the leave as FMLA qualifying at the time the employer is given notice of the need for leave, it may provide the employee with notice at that time. Id. § 825.300(d)(2).

The designation notice must be written. Id. § 825.300(d)(4). If the leave does not qualify for FMLA leave, the notice may be a simple written statement. Id. § 825.300(d)(4). If anything in the written designation notice changes, the employer shall inform the employee within 5 days by written notice following the employee's next request for leave. Id. § 825.300(d)(5). The employer must inform the employee how much leave is counted against his or her FMLA leave time if the amount of leave time needed is foreseeable, and if the leave needed is not foreseeable, the employer shall inform the employee of the amount of leave counted against their FMLA upon the employee's request, but not more than once per month. This notice may be oral or written, but if the notice is oral, it must be confirmed in writing by the next payday. Id. § 825.300(d)(6).

If the employer will require the employee to present a fitness-for-duty certification in order to be restored to employment, the employer now must provide notice of such through its designation notice. Further, if this certification must indicate that the employee can perform the essential functions of his or her position, this also must be included in the designation notice. If the employer's handbook indicates that the employee must provide a fitness-for-duty certification, then the employer does not have to provide written notice, but may provide oral notice of the requirement along with the written designation notice. Id. § 825.300(d)(3).

Further, under the new regulations, if an employer does not designate leave as required, the employer may retroactively designate leave as FMLA leave with appropriate notice to the employee, as long as the failure to timely designate leave does not cause harm or injury to the employee. Id. § 825.301(d). If the retroactive designation causes harm to the employee, it may be the basis for an interference claim. Id. § 825.300(e).

If there is a dispute between the employer and the employee as to whether leave qualifies as FMLA leave, the regulations now provide that the dispute must be resolved through discussions between the employer and the employee. Also, the discussions and decision must be documented. Id. § 825.301(c).

E. Consequences Of Failure To Provide Proper Notice

The penalties for an employer's failure to provide proper notice have increased. Such a

failure may be the basis for an interference claim. Further, an employer may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or other relief tailored to the harm suffered. Id. § 825.300(e).

V. Employee Notice Requirements

A. Content Of Notice

An employee must provide notice sufficient for the employer to determine that the leave is for an FMLA-qualifying event and the anticipated timing and duration of the leave. The regulations now specifically state that, in the case of unforeseeable leave, calling in "sick" without providing any additional information is not sufficient notice to trigger an employer's obligations under the Act. Id. § 825.303(b). Further, the new regulations provide that, when an employee seeks FMLA leave for a qualifying reason for which the employer previously has granted FMLA-protected leave, the employee must specifically reference the qualifying reason for leave or the need for FMLA leave. Id. §§ 825.302(c), 303(b). If the employee fails to respond to reasonable inquiries by the employer regarding the request for leave, leave may be denied if the employer is unable to determine whether the leave is FMLA-qualifying. Id. §§ 825.302(c), 303(b).

B. Compliance With Employer's Policy

If the employer has a usual and customary notice and procedural requirement for requesting leave, the employer may require the employee to comply with these policies, absent unusual circumstances. For example, an employer may require employees to call a designated number or a specific individual to request leave. An "unusual circumstance" in which the employee's failure to comply with the policy will be excused includes: (1) if the employer provides a number to call in to provide notice for a leave request, but no one answers and the voice mailbox is full, or (2) the employee is unable to use the phone due to a medical emergency. Id. §§ 825.302(d), 303(c). If the employee fails to follow the policy and there are no unusual circumstances, the employer may delay or deny leave. However, the employer may not delay or deny leave if its policies require a longer notice period than required by the Act. Id. § 825.302(d).

C. Delaying Or Denying Leave Due To Improper Notice

In order to delay or deny leave, the employee must have actual notice of his or her FMLA notice requirements. However, this would be satisfied by the employer's proper posting of the required notice and its provision of the required notice in an employee handbook or employee distribution as provided for above. Id. § 825.304(a). If the need leave is foreseeable at least 30 days in advance and the employee fails to give timely advance notice with no reasonable excuse, the employer may delay FMLA leave until 30 days after the date the employee provides notice. Id. § 825.304(b).

When the need for leave is foreseeable fewer than 30 days in advance and the employee

fails to give notice as soon as practicable under the circumstances, whether the employer may delay FMLA coverage depends on the facts of the particular case. If the failure to provide notice was not reasonable, then the employer may delay leave for a period of time. For example, if the employee had two weeks' notice of the need for leave, but only provided one week notice, the employer may delay the onset of the leave by one week. Id. § 825.304(c). Whether unforeseeable leave may be delayed depends on the facts of each case. Id. § 825.304(d).

VI. Certification

A. General Rule

In addition to permitting an employer to require certification of the employee's or a covered family member's serious health condition, the employer now also may require certification if the leave is for a qualifying exigency or to care for a covered servicemember with a serious illness or injury. The employer must provide notice of the certification requirement each time a certification is required, and such notice must be written when required by the rights and responsibilities notice. An employer may orally request that an employee furnish a subsequent certification. Id. § 825.305(a).

B. Timing Of Certification Request

Employers now are provided more time to request medical certification in connection with an employee's request for leave. Under the new regulations, if the leave is foreseeable, the employer should request a certification at the time the employee gives notice of the need for leave, or within five business days (increased from two business days). If the leave is unforeseeable, the employer should request a certification within five days of the commencement of leave. If the employer later discovers a reason to question the appropriateness of the leave or its duration, the employer may request a certification at a later time. The employee must return the requested certification to the employer within 15 days after the employer's request, unless it not practicable under the circumstances despite the employee's diligent, good-faith effort to do so or the employer has extend the 15-day period. Id. § 825.305(b).

C. Certification Must Be Complete And Sufficient

The revised regulations now define the circumstances under which a certification is considered incomplete or insufficient and also specify the procedures for curing deficiencies in the certification. In this regard, the regulations state that the employee must provide certification that is both "complete" and "sufficient." An incomplete certification is when the employer receives a certification, but one or more portions of the certification have not been completed. An insufficient certification means the certification is complete, but is vague, ambiguous, or non-responsive. Id. § 825.305(c).

The employer must advise the employee if the employer finds a certification to be incomplete or insufficient and must inform the employee of the additional information needed to make the certification complete. If the certification is deficient for either reason above, the employer must provide the employee with seven days to cure the deficiency, unless this is not

practicable under the circumstances. If the employee fails to cure the deficiencies, the employer may deny leave. If an employee never returns a certification to an employer, this is considered a complete failure to provide certification and not an incomplete or insufficient certification. Id. § 825.305(c).

If the employee fails to provide the employer a complete and sufficient certification, despite being given the opportunity to cure any deficiencies, or fails to provide certification at all, the employer may deny leave. This rule applies to the initial and subsequent certifications, second or third opinions, and fitness-for-duty certifications. At the time the certification request is made by the employer, the employer must inform the employee of the consequences of the employee's failure to provide adequate certification. Id. § 825.305(d).

D. Certification For A Serious Health Condition

1) Annual Medical Certification

Where the employee's need for leave is due to the serious health condition of the employee or the employee's covered family member and lasts beyond a single leave year, the employer now may require the employee to provide a new medical certification in each year the employee subsequently takes leave. Id. § 825.305(e).

2) Different Certification Forms For Serious Health Condition Of Employee And Of Covered Family Member

Under the new regulations, there now are separate medical certification forms for an employee's serious health condition and for a family member's serious health condition. The form relating to an employee's serious health condition permits employers to seek information about why the employee cannot perform the essential functions of his or her job due to the medical conditions as well as the nature of any other work restrictions and the likely duration of such inability. The form pertaining to the serious health condition of a covered family member seeks information on the type of care being provided by the employee to the family member and the frequency and duration of the care. Id. § 825.306(b). The DOL has issued a model for certifications (Form WH 380E and 38F).

3) Information Obtained Through Worker's Compensation, Paid Leave Policies, Or ADA May Be Considered

The regulations now provide that, if an employee is on FMLA leave concurrently with a workers' compensation absence, and the provisions of the worker's compensation statute permit the employer to request additional information from the worker's compensation carrier, the employer may follow the worker's compensation provisions, and information received through those procedures may be considered when determining the employee's entitlement to FMLA leave. Likewise, an employer may request additional information in accordance with a paid leave policy or disability plan that requires greater information to qualify for payments or benefits, provided that the employer informs the employee that the additional information only needs to be provided in connection with receipt of such payments or benefits. Additionally, if the

serious health condition also may be a disability under the Americans with Disabilities Act ("ADA"), the employer may follow the procedures for requesting medical information under the ADA. Id. §§ 825.306(c), (d).

4) Certification Requirements Apply When Paid Leave Is Substituted

Under the old regulations, if the employer's sick or medical leave plan required less information to be furnished in medical certifications as compared to the FMLA's certification requirements, and the employee elected or the employer required the employee to substitute paid leave for unpaid FMLA leave, only the employer's lesser sick leave certification requirements could be imposed. The new regulations deleted this provision and now permit employers to require all of the information the FMLA permits for medical certifications even when paid leave is substituted.

5) Time Periods For Requesting Recertification Modified

The revised regulations now permit employers to request medical recertification every six months. Under the old regulations, if the minimum duration of the period of incapacity specified on a medical certification was more than 30 days, the employer could not request recertification until the minimum duration had passed, unless: (1) the employee requested an extension of leave; (2) circumstances described by the previous certification had changed significantly; or (3) the employer received information that cast doubt on the employee's stated reason for the absence or the continuing validity of the certification. Now, the employer may require recertification of the leave every six months in all cases, even if the certification indicates that the employee will need leave for a period in excess of six months.

E. Certification Of A Qualifying Exigency

The new regulations also include provisions on certifying leave related to military service. With respect to leave for a qualifying exigency arising out of the active duty or call to active duty status of a covered military member, the first time an employee requests leave for that reason, an employer may require the employee to provide a copy of the covered military member's active duty orders or other documentation issued by the military that indicates that the covered military member is on active duty or call to active duty status in support of a contingency operation, as well as the dates of the covered military member's active duty service. This information only has to be provided to the employer once. If new orders are issued for a different qualifying exigency, a copy of the new orders shall be provided to the employer. Id. § 825.309(a).

In connection with this certification, the employer may require: (1) a statement or description, signed by the employee, of appropriate facts regarding the qualifying exigency for which FMLA leave is requested; (2) the approximate date on which the qualifying exigency commenced or will commence; (3) if an employee requests leave for a single, continuous period of time, the beginning and end dates for such absence; (4) if an employee requests leave on an intermittent basis or reduced-leave schedule, an estimate of the frequency and duration of the qualifying exigency; and (5) if the qualifying exigency involves meeting with a third party, the

appropriate contact information for the individual or entity with whom the employee is meeting, and a brief description of the purpose of the meeting. Id. § 825.309(b). This information also is included in a new form promulgated by the DOL (Form WH-384).

If the employee provides a complete and sufficient certification to support his or her request for leave due to a qualifying exigency, the employer may not request any additional information. However, if the qualifying exigency involves meeting with a third party, the employer may contact the individual or entity with whom the employee is meeting to verify the meeting or appointment and the nature of the meeting. An employer also may contact an appropriate unit of the Department of Defense to request verification that a covered military member is on active duty or call to active duty status, but no additional information may be requested. Id. § 825.309(d).

F. Certification Of Care For A Covered Servicemember

An employer may require an employee to obtain a certification completed by an authorized healthcare provider of the covered servicemember. The regulations provide a list of health care providers who may complete the certification, including a health care provider from the U.S. Department of Defense. The certification may request the following information: (1) the name, address, and contact information of the health care provider, the type of medical practice, the medical specialty, and whether the health care provider is on of the above accepted providers; (2) whether the covered servicemember's injury or illness was incurred in the line of duty on active duty; (3) the approximate date on which the serious injury or illness commenced, and its probable duration; (4) a statement or description of appropriate medical facts regarding the covered servicemember's health condition for which FMLA leave is requested; (5) information sufficient to establish that the covered servicemember is in need of care, whether the need is for a single continuous period of time, and an estimate of beginning and ending dates for this period; (6) if the leave request is for intermittent or reduced-schedule leave, information to establish whether there is a medical necessity for the covered servicemember to have such periodic care, and an estimate of the treatment schedule; and (7) if an employee requests leave on an intermittent basis or reduced-schedule leave and is for other than planned medical treatment, whether there is a medical necessity for the covered servicemember to have such periodic care. Id. § 825.310(b).

In addition, an employer also may request that the certification sets forth the following information provided by an employee and/or a covered servicemember: (1) the name and address of the employer of the employee requesting leave to care for the covered servicemember, the name of the employee requesting leave, and the name of the covered servicemember; (2) relationship of the employee to the covered servicemember; (3) whether the covered servicemember is a current member of the Armed Forces, the National Guard, or Reserves, and the covered servicemember's military branch, rank, and current unit assignment; (4) whether the covered servicemember is assigned to a military medical facility as an outpatient or to a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients, and the name of the medical treatment facility or unit; (5) whether the covered servicemember is on the temporary disability retired list; and (6) a description of the care to be provided to the covered servicemember, and an estimate of the

duration of leave need to provide such care. Id. § 825.309(c).

An employer may seek clarification and authentication of a certification for leave to care for a covered servicemember. However, unlike certification of a serious health condition, the employer may not request a second or third opinion or request recertification of care for a covered servicemember. Id. § 825.309(d). If the employee fails to provide the employer with a complete and sufficient certification, the employer may deny FMLA leave. Id. § 825.309(f).

G. Fitness-For-Duty Certification

Under the old regulations, a fitness-for-duty certification could consist only of a "simple statement" of an employee's ability to return to work. Now, in addition to a certification that the employee is able to resume work, an employer also may require that the certification specifically address the employee's ability to perform the essential functions of his or her job. If the employer will require such certification, the employer must provide the employee a list of the essential functions of the employee's job with or before the designation notice, and the designation notice must inform the employee that the fitness for duty certification will request such information. Id. § 825.312(b). The designation notice provided to employees must indicate that the employer will require a fitness-for-duty certification in order to return to work and whether the certification must address the employee's ability to perform the essential functions of his or job. Id. § 825.312(d).

Additionally, in the case of intermittent FMLA leave for an employee's own serious health condition, an employer may require employees to present a fitness-for-duty certification every 30 days if the employer determines that reasonable safety concerns exist regarding the employee's ability to perform his or her duties because of the employee's serious health condition. In such a case, the employer must provide notice in its designation notice. The notice should indicate that, for each subsequent instance of intermittent or reduced schedule leave, the employee must provided a fitness-for-duty certification, unless one already has been submitted in the past 30 days. For the purposes of this section, "reasonable safety concerns" mean a reasonable belief of significant risk of harm to the individual employee or others. The employer should consider the nature and severity of the harm and the likelihood that such harm may occur. Id. § 825.312(f).

VII. Intermittent Leave

A. Minimum Increment

The revised regulations have modified the minimum increment of intermittent or reduced-schedule leave that may be counted toward an employee's FMLA leave entitlement. When an employee takes intermittent or reduced-schedule leave, the employer must account for the leave using an increment no greater than the shortest period of time than the employer uses to account for use of other forms of leave, provided that it is not greater than one hour and provided further that an employee's FMLA leave entitlement may not be reduced by more than the amount of leave. If the employer uses different increments at different times of the day or shift, the employer may not account for FMLA with an increment larger than the shortest period used to account for other forms of leave during the period that the leave is taken. If the employer's

minimum increment for other forms of leave is greater than one hour, the employee may not use an increment to account for FMLA greater than one hour. Id. § 825.205(a).

B. Physically Impossible Leave

Further, the regulations impose a new rule for "physically impossible" intermittent leave. In this regard, if it is physically impossible for the employee, using intermittent or reduced-schedule leave, to begin or end work mid-shift, such as for a flight attendant or railroad conductor, the entire period that the employee is forced to be absent is designated as FMLA leave. Id. § 825.205(a)(2).

C. Variable Schedule

In addition, the regulations now provide that, if an employee's schedule varies from week to week so that an employer is unable to determine with certainty how many hours the employee otherwise would have worked but for taking FMLA leave, the employer now must use a weekly average of the hours scheduled over the 12 months prior to the beginning of the leave period to calculate the employee's leave entitlement. Under the prior regulations, the employer was required to calculate the amount of leave on a pro rata or proportional basis by comparing the employee's new and old work schedules.

D. Overtime

The DOL also has clarified the impact of overtime on FMLA leave entitlement. Specifically, if the employee normally would work overtime, but is unable to do so because of an FMLA-qualifying reason that limits the employee's ability to work overtime, the hours that the employee would have been required to work may be counted against the FMLA entitlement. For example, if the employee normally would work 48 hours each week, but now may work only 40 hours a week due to a serious health condition, the employee would use 8 hours of FMLA leave out of the 48-hour workweek (1/6 of a workweek). However, this rule does not apply to voluntary overtime hours that an employee cannot work. Id. § 825.205(c).

VIII. Other Changes

A. Professional Employer Organizations Addressed

The new regulations also address the application of the FMLA to Professional Employer Organizations ("PEO"). In the context of joint employment, a PEO contracts with employers to perform administrative functions such as payroll, benefits, and updating employment policies. Whether a PEO is a joint employer turns on the economic realities of the situation based on all the facts and circumstances. The PEO must do more than mere administrative functions to be considered a joint employer. If the PEO has the right to hire, fire, assign, or direct and control the client's employees or control their benefits, this may lead to a determination that the PEO is a joint employer. Unlike the case of traditional employment agencies, a PEO's client employer typically will be considered the primary employer in a joint employer relationship with the PEO. The regulations also specify how employees are counted toward FMLA coverage in the PEO

context. Id. § 825.106(b).

B. Settlement Of Past FMLA Claims Permitted

The new FMLA regulations still provide that employees may not waive prospective rights under the FMLA. However, they now explicitly state that employees are permitted to settle past FMLA claims without approval by the DOL or a court. Id. § 825.220(d).

C. Light Duty Does Not Affect FMLA Entitlements

The revised regulations clarify that an employee's acceptance of a light duty assignment does not affect his or her rights to FMLA leave or to job restoration. The employee's job basically is on hold until the completion of the light duty assignment, at which point the employee may use the remainder of his or her FMLA leave entitlement or be restored to the position he or she held prior to taking FMLA leave. Id. § 825.302(d).

D. FMLA Leave May Be Considered When Awarding Bonuses

Under the prior regulations, employees could not be disqualified due to taking FMLA leave from bonuses for perfect attendance or for safety. The new regulations change this rule. Now, employers may deny payment to employees for bonuses or other payments based on the achievement of a specified goal (such as perfect attendance, hours worked, or products sold) where the employee has not met that goal due to FMLA leave, unless otherwise paid to employees on an equivalent leave status for a reason that does not qualify as FMLA leave (such as paid vacation leave). Id. § 825.215(c).

E. Increased Penalties For FMLA Violations

The DOL has imposed new penalties on employers for interfering with, restraining, or denying the exercise of employees' FMLA rights. Specifically, employers now may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or other relief tailored to the harm suffered. Id. § 825.220(b).

IX. New FMLA Forms

In connection with the revised regulations, the DOL has promulgated several forms that either are new or replace the prior forms. The new optional forms cover (1) New Certification of Health Care Provider for Employee's Serious Health Condition (Form WH-380E); (2) New Certification of Health Care Provider for Family Member's Serious Health Condition (Form WH-380F); (3) Notice to Employee of Rights Under FMLA (WH Publication 1420); (4) Notice of Eligibility Rights Under FMLA (Form WH-381); (5) Designation Notice (Form WH-382); (6) Certification of Qualifying Exigency for Military Family Leave (Form WH-384); and (7) Certification of Serious Injury or Illness of Covered Servicemember for Military Leave (Form WH-385).

Freeman Mathis & Gary, LLP is a leading specialty litigation firm, serving clients in the practice areas of labor and employment law, business liability and insurance law, government law, construction law, and commercial and complex litigation. Bradley T. Adler and Mary Anne Ackourey are Partners in the Labor Law and Employment Litigation Section of Freeman Mathis & Gary, LLP. They represent public and private sector employers on a national, regional and local basis in resolving labor and employment related issues, including employment discrimination claims, wage and hour claims, family and medical leave claims and disputes regarding employee theft, embezzlement, non-compete, non-solicitation and confidentiality agreements.