



## FMLA ADVISORY

### February 2009

On January 16, 2009 new FMLA regulations became effective, changing the way employees and employers must act to comply with the legal requirements of the FMLA. A large addition was made to include new regulations that address the National Defense Authorization Act (NDAA's) which is the addition of military family leave.

**This is a summary of the updates. For specific and individual questions or concerns please call the Union Office.**

**Leave Circumstances**-The first four have not changed, 5 and 6 are additions.

1. To care for the employee's newborn son or daughter.
2. The adoption/foster care placement of a child with the employee.
3. To care for the employee's spouse, son or daughter, or parent who has a serious health condition.
4. Because of the employee's own serious health condition.
5. Because of any qualifying **exigency**\* arising out of the fact that the spouse, son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the armed forces in support of a contingency operation.
6. The law also allows eligible employees to take up to 26 workweeks for leave during a single 12-month period if the employee is the spouse, son, daughter, parent or next of kin caring for a military service member recovering from a serious injury or illness suffered while on active duty in the armed forces. The 26 workweeks are available during a single 12-month period.

*\*The Regulations define **exigency** as a short-term deployment, military events and related activities, childcare and school activities, financial and legal arrangements, counseling, rest and recuperation, post-deployment activities, and additional activities when the employer and employee agree to the leave. An eligible employee can take up to 12 weeks of FMLA leave, including intermittent or reduced schedule leave for these purposes. **The aforementioned definitions are all related to military FMLA leave entitlements.***

**Employer Notice Obligations**-When employees request FMLA leave, employers must provide employees with notice within five (5) business days that they are eligible for FMLA leave. After the employer has received sufficient information that the request for leave is FMLA-qualifying, it must designate the leave as such within five (5) business days. The notice must inform the employee of how much time will be counted against his or her FMLA leave allotment.

**Employee Notice Obligations**-When employees learn of a need for FMLA leave fewer than 30 days in advance, they are required to give notice of their need either the same business day or the next day, absent emergency situations. Also, if employees do not follow their employers' call-in policies, they may be subject to disciplinary measures, absent extraordinary circumstances.

**Medical Certification**-The DOL has split the recommended medical certification form into two (2) parts: one for an employee's own serious health condition and another for a family member's serious health condition. An employer may now contact an employee's health care provider for clarifying and verifying the worker's medical certification, if the employee is first given the opportunity to do so and the requirements of the Health Insurance Portability and Accountability Act (HIPAA) have been met. If an employee fails to give consent to the contact, he or she may lose FMLA protection if his or her medical certification is incomplete or insufficient.

**Nonconsecutive Periods of Service**-Employers are required to count any service an employee had with an employer, prior to a break in service of up to seven (7) years, toward his or her 12-month eligibility threshold.

**Designation of Leave**-The new regulations delete an original provision that stated that if employers did not designate FMLA-qualifying leave as FMLA leave it would not count against an employee's FMLA leave entitlement. Now an employer can be liable for not designating FMLA-qualifying leave only if the employee can demonstrate he or she suffered actual harm.

**Serious Health Condition**-The new regulations clarify that if an employee takes leave for a medical condition involving more than three (3) consecutive calendar days of incapacity and needs to have two visits to a health care provider, those visits must occur within 30 days of the period of incapacity for the condition to be classified as a serious health condition. Also for a chronic serious health condition to be present, an employee must make at least two visits per year to a health care provider.

**Light Duty**-The rules clarify that time spent in a light-duty capacity does not count against an employee's FMLA leave allotment.

**Waiver of Rights**-The rules clarify that an employee can voluntarily settle past FMLA claims without court or departmental approval. An employee's waiver of prospective FMLA rights is prohibited.