

Family and Medical Leave Act Regulations

The United Food and Commercial Workers International Union represents 1.3 million workers in North America, primarily in the grocery, retail, and meatpacking industries.

On November 17, 2008, the Bush administration's Labor Department issued its final changes to the Family Medical and Leave Act (FMLA) regulations. In general, the changes place more obstacles in the path of employees who seek to use FMLA leave. The regulatory changes also allow employers more flexibility in granting and administering FMLA leave.

Ameliorative changes to the Bush administration's newly issued final regulations will require new rule making with the attendant notice and comment period. Examples of the onerous nature of the new regulations follow.

One of the regulatory changes will make it more difficult for an employee to use paid leave concurrently with FMLA leave. Under this change, an employee who seeks to use paid vacation for all or a portion of his FMLA leave will have to comply with the employer's rules regarding notice or allotted blocks of time in order to take vacation time while on FMLA time.

Under another regulatory change, an employer can require an employee with a serious health condition to recertify that his condition is a serious health condition every six months even though the health care provider has certified that the condition is a condition which will last longer than six months. This change will place additional burdens on employees or family members with chronic or episodic conditions.

In a regulatory change which raises concern about loss of employee privacy, the final regulations allow employer representatives, other than the employer's health care provider, to contact the employee's health care provider for answers to questions about the employee's or family member's certification form. Even though an employee's immediate supervisor cannot obtain information regarding the employee's (or family member's) medical condition, other supervisory personnel will have access to medical information previously available only to the employer's health care provider.

Another major change in the regulations is the reduced time period given employees to provide employers with notice of their need for FMLA leave. The new regulations retain the 30-day notice requirement for foreseeable leave. However, if 30 days notice is not possible, the employee now has only one day, instead of two days, to notify the employer after discovering the need for leave.

As for unforeseeable leave, employees no longer have two days after becoming aware of the need for leave to notify the employer; instead, in order to take unforeseeable leave, the employee must comply with the employer's rules for giving notice for unforeseeable leave. For example, an



employee requesting unforeseeable leave for his shift would have to comply with an employer rule to call in three hours before the start of the shift. Although the regulations allow for an extension of the notice period depending on the facts and circumstances, the shortened notice periods increase the likelihood of delay or denial of leave and resultant disputes and discipline.

Moreover, the final regulations also change the previous regulations regarding use of intermittent leave. Previously, an employer could require an employee to use only as much leave as medically necessary. So an employee who needed only two hours of FMLA leave could be charged only two hours of FMLA even if the employee had a job which he could not resume after commencement of the shift. Under the final regulations, the employee who cannot rejoin his shift after use of a small leave allotment will be charged for an entire day of FMLA leave.

While making less flexible employees' obligation to provide employers with notice of the need for leave, the final regulations allow employers more time—from two to five days—to respond to the employees' leave requests. Additionally, the final regulations require employers to provide less information to employees on such subjects as the amount of leave available and the reasons for denial of leave.

The final regulations provide that an employee may waive FMLA claims without Department of Labor (DOL) or court review, even though unreviewed waivers had previously been a disputed issue.