National Account Services
Outsourcing for HR, Benefits and Payroll

TECH FLEX

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The topics covered in this issue are:

DOL RELEASES FINAL FMLA REGULATIONS

On November 17, 2008, the United States Department of Labor (DOL) released the Family Medical and Leave Act (FMLA) final regulations. These final regulations provide modifications to the current FMLA rules in relation to what constitutes a serious health condition, the substitution of paid leave for FMLA leave, notice requirements (including timeframes) for employees and employers and the requirements surrounding the medical certification process, including who may contact an employee's health care provider to authenticate a submitted FMLA leave medical certification. In addition, the DOL release provides guidance in relation to the "Military Servicemember Leave" and "Qualifying Exigency Leave" whose provisions were added to the FMLA upon the enactment of the National Defense Authorization Act (NDAA) as signed into law by President Bush on January 28, 2008.

The following is a summary of several more significant changes adopted into the final FMLA regulations. These brief comments include a comparison of the current rules and the modified rules found in the FMLA final regulations. **These final regulations are effective 60 days from the date of release by the DOL in the Federal Register on November 17, 2008 or January 16, 2009.**

Employees "Eligible" to Take Leave under FMLA

Current Rule: The regulations currently stipulate that in order for an employee to be eligible to take leave under the FMLA, the employee must have been employed by the employer for at least 12 months, have been employed for at least 1,250 hours of service and be employed at a worksite where 50 or more employees are employed by the employer within 75 miles of a worksite. In addition, the current regulations specifically state that the 12-month employment requirement "need not be consecutive." Consequently, any amount of time of employment with the employer (even if 10 years ago) must be counted toward the 12-month employment requirement.

FINAL Rule: The DOL final regulations provides that employment prior to a continuous break in service of **seven** years or more need not be considered when calculating the 12-month employment requirement, EXCEPT in the two following circumstances:

1. A break in service due to military duty.

2. Where a written agreement exists between the employer and employee concerning the employer's intent to rehire the employee.

In the above two circumstances, employment prior to a break in service must be considered when calculating whether the employee has been employed for at least 12 months, regardless of the length of the break in service.

In addition, any time that an employee would have worked for the employer but for the employee's fulfillment of National Guard or Reserve military service obligation must be counted toward the 12-month and 1,250-hour requirements.

It is important to note that the final regulations allow an employer to continue to count all periods of service (including those prior to a continuous **seven** year break in service) toward the 12-month employment if it so chooses, as long as the employer does so uniformly with respect to all employees with similar breaks in service.

FMLA "Serious Health Condition"—Continuing Treatment Requirement

Current Rule: Under the current regulations, in order to be considered a "serious health condition" an employee must receive inpatient care or continuing treatment (among other requirements). Continuing treatment means that an employee must experience more than three consecutive calendar days of incapacity plus "two visits to a health care provider." The time period in which the two visits must occur is open ended.

FINAL Rule: The final regulations stipulate that continuing treatment could mean that (among other things) two visits to a health care provider (described above) must occur within 30 days of the beginning of the period of incapacity unless extenuating circumstances exist. In addition, an employee must make an initial visit to a health care provider within **seven** days of the day on which the incapacity begins. Finally, the final rule states that the period of incapacity must be more than three consecutive **"full"** calendar days in order to clarify that the calendar day requirement cannot be met by utilizing partial days.

Current Rule: Under the FMLA regulations, a chronic serious health condition is one which requires "periodic visits" for treatment by a health care provider (among other requirements). However, the term "periodic" is not defined under the current regulations.

FINAL Rule): The final regulations define the term "periodic" as treatment by a health care provider as "at least twice a year."

Increments of FMLA Leave for Intermittent or Reduced Leave Schedule

Current Rule: The current regulations stipulate that employers must account for intermittent FMLA leave in the smallest increment of time used by the employer's payroll system when accounting for absences or use of leave provided that increment is one hour or less.

FINAL Rule: The final regulations require that when an employee takes FMLA leave on an intermittent or reduced leave schedule basis, the employer must account for the leave using an increment no greater than the shortest period of time that the employer uses to account for time taken for other types of leaves provided that the increment used is not greater than one hour.

As a result, employers will not be required to account for FMLA leave in the smallest increment based on the employer's payroll accounting system. For example, if the employer utilizes 15-minutes to account for sick leave and one-hour increments to account for vacation time, the employer is required to utilize the smallest increment (in this scenario 15 minutes) to measure time used under the FMLA.

Current Rule: Currently where an employee works a varied week to week schedule to such an extent that the employer is unable to calculate how many hours the employee averages per week with certainty, the employer is required to use the average number of hours worked using the 12-week period preceding the commencement of leave by the employee.

FINAL Rule: The final regulations have modified the required calculation from the 12-week period preceding the leave noted above, to a "weekly average of the hours scheduled over the 12 months prior to the beginning of the leave period (including any hours for which the employee took leave of any type)" for determining the employees leave entitlement.

Holiday Counted as FMLA Leave Time

Current Rule: Currently, the regulations stipulate that "the fact that a holiday may occur within the week taken as FMLA leave has no effect; the week is counted as a week of FMLA leave." The DOL in December of 2006 through a request for information (RFI) asked for comments on whether "scheduled holidays" should count against an employee's 12 weeks of leave when the employee is out for a full week as they do now.

FINAL Rule: The final regulations adopted the following rules in relation to holidays:

If an employee is using FMLA in increments of less than one week, the holiday will **not** count against the employee's FMLA time unless the employee was otherwise scheduled and expected to work during the holiday.

However, if an employee needs a full week of FMLA leave during a holiday week, the hours the employee does not work on the holiday may be counted against the employee's FMLA time.

In addition, if for some reason the employer's business activity has temporarily ceased and employees generally are not expected to report for work for one of more weeks (i.e. a school closing for two weeks for the Christmas/New Year holiday or the summer vacation or an employer closing the plant for retooling or repairs), the days the employers' activities have ceased do **not** count against the employee's FMLA leave entitlement.

Substitution of Paid Leave for FMLA

Current Rule: Under the current regulations, FMLA leave is unpaid. However, an employee may choose to substitute paid leave (e.g. vacation) for FMLA. Further, if an employee does not choose to substitute accrued paid leave, the employer may require the employee to substitute accrued paid leave for FMLA. If an employee uses paid leave under circumstances which do not qualify as FMLA, the leave may not be counted against the 12 weeks of FMLA leave to which the employee is entitled. For example, paid sick leave used for a medical condition which is not a serious health condition may not be counted against the employee's 12 weeks of FMLA time. If the employee elects or the employer mandates substituted paid leave for an FMLA qualifying reason, the paid leave and FMLA leave will run concurrently.

Also, it is currently stated that when an employee or employer elects to substitute paid leave, and the employer's paid leave program applies less stringent procedural standards for taking leave than the FMLA (e.g., notice or certification requirements) only the less stringent requirements may be imposed.

FINAL Rule: The final regulations stipulate that the terms and conditions of an employer's paid leave policies apply and must be followed by the employee in order to substitute any form of accrued paid leave such as paid vacation, personal leave, paid time off or sick leave in lieu of unpaid FMLA.

Examples:

- If an employer's paid personal leave policy requires two days notice for the use of personal leave, an employee seeking to substitute personal leave for unpaid FMLA leave would need to meet the two-day notice requirements prior to receiving the paid personal leave.

- Where an employer's policy requires vacation leave be taken in full-day increments, an employee substituting vacation for FMLA leave would not have the right to use less than a full day of vacation leave.

In addition, the final regulations clarified that the term "substitute" means that the paid leave provided by the employer, and accrued pursuant to established policies of the employer, will run concurrently with the unpaid FMLA.

It is important to note that if the employee fails to meet the employer's conditions for taking paid leave, the employee remains entitled to take unpaid FMLA leave and the paid leave remains in place.

Perfect Attendance Bonuses

Current Rule: Current regulation § 825.215(c)(2) states that "many employers pay bonuses in different forms to employees for job-related performance such as perfect attendance, safety…and exceeding production goals." As bonuses for perfect attendance and safety do not require performance by the employee, but rather reward based on the lack of accidents and occurrences or days missed from work, an employee who takes FMLA leave but met all the requirements for a perfect attendance bonus, absent the FMLA leave, may not be disqualified for the bonus because of the FMLA leave (i.e. FMLA is not counted as an absence from work for perfect attendance bonus purposes).

FINAL Rule: The final regulations modify the treatment of perfect attendance awards to allow employers to deny a "perfect attendance" award to an employee who takes FMLA leave as long as the employer treats employees taking non-FMLA leave the same.

Specifically, final regulation § 825.215(c)(2) states:

> if a bonus or other payment is based on the achievement of a specified goal such as hours worked, products sold or perfect attendance, and the employee has not met the goal due to FMLA leave, then the payment may be denied, unless otherwise paid to employees on an equivalent leave status for a reason that does not qualify as FMLA leave. For example, if an employee who used paid vacation leave for a non-FMLA purpose would receive the payment, then the employee who used paid vacation leave for an FMLA-protected purpose also must receive the payment.

Light Duty as FMLA Leave

Current Rule: Under the current regulations, if an employee has voluntarily accepted a light duty position in lieu of taking FMLA leave, the employee's right to restoration to the same or equivalent position is available "until 12 weeks have passed within the 12-month period, including all FMLA leave taken and the period of light duty." Two courts interpreted this language to mean that that an employee uses his or her 12 week FMLA leave entitlement while performing work in a light duty assignment.

FINAL Rule: The final rules stipulate that employers may not require employees to accept light duty work in lieu of taking FMLA leave and that time spent in a light duty assignment may **not** be counted against the employees' FMLA entitlement. In addition, the acceptance of a light duty assignment does **not** result in the employee waiving his or her rights to be restored to the same (or an equivalent) job position held when the FMLA leave commenced.

Employer Posting Requirements

Current Rules: Currently every employer covered by the FMLA is required to post and keep posted on its premises in a "conspicuous place" a notice explaining the employees' FMLA rights and responsibilities. In addition, if an employer subject to FMLA has any employees' eligible for FMLA and provides any written guidance to employees concerning employee benefits or leave rights (e.g., employee handbook), information pertaining to an employee's FMLA entitlements and obligations must be included in such a communication.

FINAL Rule: Under the final regulations, the poster/notice requirements and the distribution of employee information materials have been merged and the DOL has provided a form titled **"Notice to Employees of Rights Under FMLA" (Form WH-1420) in Appendix C of the Final Regulations** for employers to use satisfying the posting and distribution requirement.

In addition, the final regulations require that where an employer's workforce is comprised of a significant portion of workers who are not literate in English, the employer must provide the general notice in a language in which the employees are literate.

Employer Notice Obligations – Eligibility Notice

Current Rule: The DOL currently requires that once the employer becomes aware of an employee's need for FMLA leave, the employer must notify the employee of his or her eligibility for FMLA leave within two business days.

FINAL Rule: The final regulations provide that the employer must notify the employee of the employee's eligibility to take leave **within five business days,** absent extenuating circumstances. The DOL has provided a model notice titled **"Notice of Eligibility and Rights & Responsibilities" (Form WH-381) in Appendix D of Final Regulations** for employers to use.

Again, where an employer's workforce is comprised of a significant portion of workers who are not literate in English, the employer must provide Form WH-381 in a language in which the employees are literate.

Employer Notice Obligations – Designation Notice

Current Rule: The current regulations require that the employer must promptly (within two business days absent extenuating circumstances) notify the employee that the leave has been designated as FMLA leave, once the employer acquires knowledge that the leave is being taken for an FMLA required reason.

FINAL Rule: The FMLA designation notification timeline under the DOL final regulations is increased **to five business days.** The DOL provided in its release a model notice titled **"Designation Notice to Employee of FMLA Leave" (Form WH-382) in Appendix E of the Final Regulations** for employers to use as its notice of FMLA designation.

In addition, if an employer does not designate leave within five business days, the employer may retroactively designate leave as FMLA leave with appropriate notice (e.g. designation notice) provided that the employer's failure to timely designate leave does not cause harm or injury to the employee. In all cases where a leave qualifies as FMLA leave, an employer and employee can mutually agree that leave be retroactively designated as FMLA leave. Under the current regulations, retroactive designation of FMLA is generally not allowed.

If the employer requires paid leave to be substituted for unpaid FMLA leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, the employer must inform the employee of this designation at the time of designating the FMLA leave. The designation notice must advise the employee if the employer will require a fitness-for-duty certification to return to

work and whether that fitness-for-duty certification must address the employee's ability to perform the essential functions of the employee's job.

If the employer determines that the leave will not be designated as FMLA, the employer must notify the employee of that designation. However, the notice to the employee that the leave is not designated as FMLA leave may be in the form of a "simple written statement." Finally, if the information provided by the employer to the employee in the designation notice changes (e.g. the employee exhausts FMLA), the employer must provide employees with written notification of the change within five business days.

Current Rule: Employers are now required to inform employees that leave "is designated and will be counted as FMLA leave", but employers are not required to provide employees with information detailing the amount of leave designated as FMLA leave.

FINAL Rule: The final regulations expressly require that the employer must inform the employee of the number of hours, days or weeks, if possible, which will be designated as FMLA leave in the designation notice. If it is not possible to provide the hours, days, or weeks that will be counted against the employees leave entitlement (such as in the case of unforeseeable intermittent leave), then the employer must provide notice of the amount of leave counted against the employee's FMLA leave entitlement upon request by the employee, but no more than once in a 30-day period and only if leave was taken in that period. The notice of the amount of leave time counted against an employee's FMLA entitlement may be oral or in writing. If such notice is oral, it must be confirmed in writing, no later than the following payday (unless the payday is less than one week after the oral notice, in which case the notice must be provided no later than the subsequent payday). Such written notice may be in any form, including a notation on the employee's pay stub.

Employee Notice Obligations

Current Rule: As it now stands, an employee must give at least 30 days' notice if the need for FMLA leave is foreseeable. If the leave is not foreseeable, notice must be provided as soon as practicable. The term "as soon as practicable" is defined in part to mean "at least verbal notification to the employer within one or two business days of when the need for leave becomes known to the employee." The current provision has been interpreted to allow some employees to provide notice to an employer of the need for FMLA leave up to two business days after an absence.

FINAL Rule: The final regulations delete the language "within one or two business days of when the need for leave becomes known to the employee." Therefore, an employee needing FMLA leave must follow the employer's established call-in procedures for reporting an absence. For example, an employer may require that written notice set forth the reasons for the requested leave, the anticipated duration of the leave, and the anticipated start of the leave. An employee also may be required by an employer's policy to contact a specific individual.

Employee Providing Medical Certification to Support FMLA Request

Current Rule: An employer now may request that an employee provide a medical certification form to substantiate the need for FMLA leave in connection with a serious health condition. Currently, if leave is foreseeable and at least 30 calendar days has been given, the employee should provide the medical certification before the leave begins. If it is not possible for the employee to return the medical certification before the leave begins, then the employer must give the employee at least 15 calendar days after leave begins to provide certification.

In addition, the current regulations provide a time frame in which an employer should request medical certification of two business days after receiving the employee's notice of need for FMLA.

FINAL Rules: Under the final regulations, the 15-day standard will be applied to both foreseeable and unforeseeable leave. In addition, the final regulations provide a time frame in which an employer should request medical certification of **five business days** after receiving the employee's notice of need for FMLA.

Failure of employee to provide certification timely:

Foreseeable leave

If an employee fails to provide certification within 15 calendar days, then an employer may deny FMLA coverage until the required certification is provided. For example, if an employee has 15 days to provide a certification and does not do so for 45 days "without sufficient reason for the delay", the employer can deny FMLA protections for the 30-day period following the expiration of the 15-day time period, if the employee takes leave during such period.

Unforeseeable Leave:

An employer may deny FMLA coverage if an employee fails to provide a certification within 15 calendar days or other greater period of time as allowed by the employer unless not practicable due to extenuating circumstances (i.e. medical emergency). Absent extenuating circumstances, the employer can deny FMLA protections for the leave following the expiration of the 15-day period until a sufficient certification is provided. If the employee never produces the certification, the leave is not FMLA leave.

Finally, the final regulations allow that an employer may request a **annual medical certification** where the employee's need for leave due to the employee's own serious health condition, or the serious health condition of the employee's covered family member, lasts beyond a single 12-month FMLA tracking period (i.e. calendar year or beginning on first day of FMLA leave). In this circumstance, an employer may require that an employee provide a new medical certification in each subsequent leave year. Further, an employer may contact the employee's health care provider for authentication and clarification purposes and exercise the options available for second and third opinions in relation to the new medical certification.

Curing Incomplete or Insufficient Medical Certification

Current Rule: Under the current regulations, an employee is provided with "a reasonable opportunity" but no timeframe for curing an insufficient medical certification.

FINAL Rule: If an employee provides an incomplete or insufficient certification, the final regulations require that employers state in writing what additional information is necessary and provide the employee with at least seven calendar days (unless not practicable under the particular circumstances despite the employee's diligent good faith efforts) to cure the deficiency.

Incomplete Certification:

A certification is considered incomplete if the employer receives a certification, but one or more of the applicable entries have not been completed.

Insufficient Certification:

A certification is considered insufficient if the employer receives a complete certification, but the information provided is "vague, ambiguous, or non-responsive."

If the deficiency is not cured within the allowed time frame and the employer advised the employee at the time the employer requested the certification of the consequences of failing to provide adequate certification, the employer may deny the taking of FMLA leave.

Revised Form WH-380 (Medical Certification)

Current Rule: Under the current regulations, Form WH-380 (DOL Provided Prototype FMLA Medical Certification) may be used to request information from the employee's health care provider to support the need for FMLA leave. This form requests the "medical facts" supporting the need for FMLA as well as the "probable duration" of the condition (among other information). This form does not request a specific diagnosis be provided.

FINAL Rule: The final regulations modified the medical certification form to provide that a health care provider MAY provide a diagnosis of the patient's health condition as part of the certification. However, if the medical certification provides sufficient facts to establish the employee's need for FMLA leave absent the diagnosis, FMLA leave may not be withheld based on the lack of a diagnosis.

An employer may require that the medical certification specify whether an employee is able to perform the essential functions of the employer's job and the employer may provide a list of the employee's job functions to health care provider.
The final regulations provide two optional forms for use in obtaining medical certification from medical providers including second and third opinions. These forms both located in **Appendix B of the final regulations** are as follows:

Optional Form WH-380E - "Certification of Health Care Provider for Employee's Serious Health Condition"

Optional Form WH-380F - "Certification of Health Care Provider for Family Member's Serious Health Condition"

Prohibition Against Employer Contacting Employee Health Care Provider Eliminated

Current Rule: Under the current rules, an employer is NOT allowed to contact an employee's health care provider in relation to the medical certification (Form WH-380). However, a health care provider working for an employer may contact the employee's health care provider, with the employee's permission, for purposes of clarification and authentication of the medical certification.

FINAL Rule: The final regulations eliminate the prohibition against an employer contacting the employee's health care directly with certain restrictions. The employer may contact the employee's health care provider**, without the employee's permission**, for purposes of clarification and authentication of the medical certification (whether initial certification or recertification) after the employer has given the employee an opportunity to cure any deficiencies in relation to the medical certification. The final regulations define the terms "authentication" and "clarification" as follows.

"Authentication" means providing the health care provider with a copy of the certification and requesting verification that the information contained on the certification form was completed and/or authorized by the health care provider who signed the document. No additional information may be requested.

"Clarification" means contacting the health care provider to understand the handwriting on the medical certification or to understand the meaning of a response. Employers may not ask health care providers for additional information beyond that required by the certification form.

To make such contact, "the employer may use a health care provider, human resources professional, a leave administrator, or a management official." However, under no circumstances may the employee's direct supervisor contact the employee's health care provider.

The employee will need to complete the required Health and Insurance Portability and Accountability (HIPAA) authorizations necessary to allow the release of individually identifiable health information (IIHI) to the employer for authentication and clarification purposes. This can be accomplished by the employee presenting a completed HIPAA Authorization to his or health care provider that is acceptable to the health care provider or completing the HIPAA Authorization provided by the health care provider. However, if the employee fails to provide the HIPAA Authorization where required, and does not otherwise clarify the certification, the employer may deny the taking of FMLA leave if the medical certification is unclear.

It is important to note that in cases where the health care provider is being provided with a copy of the medical certification the health care provider provided and being asked to verify that the information was completed and/or authorized by the health care provider, a HIPAA Authorization is not generally required as additional information is not being requested.

However, where the employee's health care provider is being contacted for "clarification" purposes such as to understand the handwriting on the medical certification or to understand

the meaning of a response, no additional information beyond that contained on the medical certification may be requested and the HIPAA Authorization requirements must be met.

Requests for Subsequent FMLA Medical Certifications

Current Rule: Employers may now generally request a recertification no more than every 30 days and only in conjunction with an FMLA absence unless a minimum duration of incapacity has been specified in the certification, in which case recertification generally may not be required until the duration specified has passed.

FINAL Rule: Under the final regulations, the medical recertification rules are as follows:

General Rule:

An employer may request certification no more often than every 30 days and only in connection with an absence by the employee.

Where Medical Certification is for a Period of More than 30 days:

If the medical certification indicates that the minimum duration of the condition is more than 30 days, an employer must wait until that minimum duration expires before requesting a recertification. For example, if the medical certification states than an employee will be unable to work, whether continuously or on an intermittent basis for a period of 40 days, the employer must wait 40 days before requesting a recertification.

Exceptions:

An employer may request recertification in less than 30 days in the following circumstances.

1. The employee requests an extension of the leave

2. The circumstances described in the last certification, such as the duration or frequency of the absence or the severity or nature of the illness has changed.

Examples Provided in the Final Regulations:

If a medical certification stated that an employee would need leave for one to two days when the employee suffered a migraine headache and the employee's absence for his or her last two migraines lasted four days each, then the increased duration of absence might constitute a significant change in circumstances allowing the employer to request a recertification in less than 30 days.

If an employee had a pattern of using unscheduled FMLA leave for migraines in conjunction with his or her scheduled days off, then the timing of the absences also might constitute a significant change in circumstances sufficient for an employer to request a recertification more frequently than every 30 days.

Six-month Rule:

In all cases, an employer may request a recertification of a medical condition every six months in connection with an absence by the employee. Consequently, even if the medical certification indicates that the employee will need intermittent or reduced schedule leave for a period in excess of six months (e.g. for a lifetime condition), the employer is allowed to require recertification every six months in connection with an employee's absence from work.

Recertifications generally follow the requirements of initial certifications, except no second or third opinion on recertification may be required.

Fitness for Duty to Return to Work:

Current Rule: An employer is allowed to have a uniformly applied policy or practice that requires similarly situated employees who take leave to provide a certification that they are able to return to work.

FINAL Rule: The following additional provisions are now enacted via the final regulations:

1. For purposes of clarifying the "fitness-for-duty certification", the employer is allowed to contact the employee's health care provider for authentication and clarification.

2. If the employer provides the health care provider with a list of the employee's essential work functions, the health care provider is required to assess the employee's ability to return to work against the provided essential work functions.

3. No second or third opinions on a fitness-for-duty certification may be required.

4. The cost of the certification is that of the employee and the employee is not entitled to be paid for the time or travel costs associated with acquiring the certification.

5. The FMLA designation notice must advise the employee if the employer will require a fitness-for-duty certification to return to work and whether that fitness-for-duty certification must address the employee's ability to perform the essential functions of the employee's job.

6. Employers may require that an employee furnish a "fitness-for-duty certification" every 30 days if an employee has used intermittent leave during that period where reasonable job safety concerns exist.

An employer may delay restoration of employment until receipt of the fitness for duty certification. In addition, if the employer provided the necessary notices an employee will no longer be entitled to reinstatement if a fitness for duty certification is not provided to the employer.

National Defense Authorization Act Amendments to the FMLA

The National Defense Authorization Act (NDAA) included an amendment to the FMLA to allow two new types of leaves for employees who are relatives of servicemembers. The two new types of leave that may be taken under the FMLA are the "Qualifying Exigency Leave" and the "Servicemember Family Leave". The final regulations provide the following guidance in relation to these military-related leave provisions.

QUALIFYING EXIGENCY LEAVE

The final FMLA regulations allow employees to take FMLA leave for any "qualifying exigency" that arises due to the employee's spouse, son, daughter, or parent being on active duty (or being notified of a call or order to active duty) in the Armed Forces and in support of a contingency operation. **It is important to note that this leave provision only applies to duty under a "call or order to active duty by members of the Reserve components and the National Guard, and also to certain retired members of the Regular Armed Forces and retired Reserve."**

The Qualifying Exigency Leave provisions are effective as of January 16, 2009.

Important Definitions:

Note that the following definitions reflect a few of the frequently used terms. The final regulations provide several additional definitions related to the NDAA FMLA amendments.

"Covered military member" means the employee's spouse, son, daughter, or parent on active duty or call to active duty status.

"Son or daughter on active duty or call to active duty status" means the employee's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stood in loco parentis (in place of a parent), who is on active duty or call to active duty status, and who is of any age.

"Active duty or call to active duty status" means duty under a call or order to active duty (or notification of an impending call or order to active duty in support of a contingency operation as outlined in the regulations). A call to active duty for purposes of leave taken because of a qualifying exigency leave refers to a Federal call to active duty. State calls to active duty are not covered unless under the order of the President of the United States.

"Contingency operation" means a military operation that 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 a military operation that results in the call or order to, or retention on, active duty of members of the uniformed services during a war or national emergency declared by the president or Congress.

Qualifying Exigency:

The final regulations define qualifying exigencies as one of the following:

Short-notice deployment: To address any issues that arise from the fact that a covered military member is notified of an impending call or order to active duty in support of a contingency operation **seven** or less calendar days prior to the date of deployment. Leave taken for this purpose can be used for a period of seven calendar days beginning on the date a covered military member is notified of an impending call or order to active duty in support of a contingency operation.

Military events and related activities: To attend any official ceremony, program, or event sponsored by the military that is related to the active duty status of a covered military member. Also to attend family support or assistance programs and informational briefings sponsored by or promoted by the military, military service organizations, or the American Red Cross that is related to the active duty or call to active duty status of a covered military member.

Childcare and school activities:

- To arrange for alternative childcare when the active duty or call to active duty status of a covered military member necessitates a change in the existing childcare arrangement.

- To provide childcare on an urgent immediate basis (but not on a routine, regular, or everyday basis) when the need to provide such care arises from the active duty or call to active duty of a covered military member.

- To enroll in or transfer to a new school or day care facility when enrollment or transfer is necessitated by the active duty or call to active duty of a covered military member.

- To attend meetings with staff at a school or a daycare facility when such meetings are necessary due to the circumstances arising from the active duty status of a covered military member.

Financial and legal arrangements: To make or update financial or legal arrangements to address the covered military member's absence while on active duty or call to active duty status, such as preparing and executing financial and healthcare powers of attorney or preparing or updating a will or living trust. Also to act as the covered military member's representative in relation to military service benefits while the covered military member is on active duty or call to active duty status.

Counseling: To attend counseling provided for the covered military member or for the child of the covered military member provided that the counseling arises from the active duty or call to active duty status of a covered military member.

Rest and recuperation: To spend time with a covered military member that is on short-term, temporary, rest and recuperation leave during the period of deployment. Eligible employees may take up to five days of leave for each instance of rest and recuperation.

Post-deployment activities: To attend arrival ceremonies, reintegration briefings and events, and any other official ceremony or program sponsored by the military for a period of 90 days

following the termination of the covered military member's active duty status. Also to address issues (e.g. funeral arrangements) that may arise from the death of a covered military member while on active duty status.

Additional activities: To address other events which may arise out of the covered military member's active duty or call to active duty status provided that the employer and employee agree that leave shall qualify as an exigency, and agree to both the timing and duration of such leave.

Amount of Leave Allowed:

The amount of time allowed for Qualifying Exigency Leave is limited to 12 workweeks of leave during any 12-month period and would run concurrent with any other FMLA leave used during the same 12-month period.

Intermittent or Reduced Schedule Basis

The Qualifying Exigency Leave may be taken intermittently or on a reduced leave schedule.

Exigency Leave Certification Requirements:

The first time an employee requests leave because of a qualifying exigency, 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 which indicates that the covered military member is on active duty or call to active duty status in support of a contingency operation and the dates of the covered military member's active duty service. This information need only be provided to the employer once for each active duty or call to active duty status.

The employer may require that any request for exigency leave be supported by a certification from the employee providing the following information.

- A statement or description signed by the employee, providing the appropriate facts supporting the request for the leave including the type of exigency leave (e.g. "counseling") and any supporting documentation.

- The approximate date on which the qualifying exigency commenced or will commence.

- If an employee requests leave because of a qualifying exigency for a single, continuous period of time, the beginning and end dates for the absence.

- If an employee requests leave because of a qualifying exigency leave on an intermittent or reduced schedule basis, an estimate of the frequency and duration of the qualifying exigency.

- If the qualifying exigency involves meeting with a third party, appropriate contact information for the individual or entity with whom he employee is meeting (such as the name, title, organization, address, telephone number, fax number, and e-mail address) and a brief description of the purpose of the meeting.

The DOL in the final regulations has provided a form for employee's use in obtaining a certification that "meets the FMLA certification requirements." The **"Certification of Qualifying Exigency for Family Military Leave" (Form WH-384) is located in Appendix G of the final regulations.** Form WH-384 or another form containing the same basic information may be used by the employer; however, no information beyond what is specified on Form WH-384 may be required.

In all instances in which the certification is requested, it is the employee's responsibility to provide the employer with complete and sufficient certifications and failure to do so may result in the denial of FMLA leave.

In all circumstances, the employer is responsible for designating leave, paid or unpaid, as FMLA-qualifying, and for giving notice of the designation to the employee.

Verification of Certification:

If an employee submits a complete and sufficient certification to support his or her request for the exigency leave, the employer may not request additional information from the employee. However, if the exigency leave involves meeting with a third party, the employer may contact the individual or entity with whom the employee is meeting for purposes of verifying a meeting or appointment schedule and the nature of the meeting between the employee and the specified individual or entity.

The employee's permission is not required in order to verify meetings or appointments with third parties, but no additional information may be requested by the employer. An employer also may contact an appropriate unit of the Department of the Defense to request verification that a covered military member is on active duty or call to active duty status without employee permission, but no additional information may be requested.

SERVICEMEMBER FAMILY LEAVE

The final regulations stipulate that FMLA eligible employees are entitled to FMLA leave to care for a covered servicemember 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. In order to care for a covered servicemember, an eligible employee must be the spouse, son, daughter, or parent, or next of kin of a covered servicemember.

The Servicemember Family Leave provisions were effective as of January 28, 2008.

Important Definitions"

Note that the following definitions reflect a few of the frequently used terms. The final regulations provide several additional definitions related to the NDAA FMLA amendments.

"Covered servicemember" means 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 Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in

outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness incurred in the line of duty on active duty.

"Serious injury or illness" means an injury or illness incurred by a covered servicemember in the line of duty on active duty that may render the servicemember medically unfit to perform the duties of his or her office, grade, rank or rating.

"Outpatient status", with respect to a covered service member, means the status of a member of the Armed Forces assigned to either a military medical treatment facility as an outpatient; or a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients.

"Son or daughter of a covered servicemember" means the covered servicemember's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the covered servicemember stood in loco parentis (in place of a parent), and who is of any age.

"Parent of a covered servicemember" means a covered servicemember's biological, adoptive, step or foster father or mother, or any other individual who stood in loc parentis (in place of a parent) to the covered servicemember. The term does **not** include parents "in law."

"Next of kin of a covered servicemember" means the nearest blood relative, other than the covered servicemember's spouse, parent, son, or daughter. For example - the brother or sister of a covered servicemember. The regulation also provides an order of priority regarding the nearest relatives. In addition, the regulation states that if numerous individuals are of the same level of relationship and no specified individual has been designated as next of kin, all such family members may be considered next of kin and eligible to take the FMLA leave to provide for the servicemember's care (either consecutively or simultaneously).

Amount of Leave Allowed:

An eligible employee is entitled to **26 workweeks** of leave to care for a covered servicemember to care for a covered servicemember with a serious injury or illness during a "single 12-month period."

The "single 12-month period" begins on the first day the eligible employee takes FMLA leave to care for a covered servicemember and ends 12 months after that date, **regardless of the method used by the employer to determine the employee's 12 workweeks of leave entitlement for other FMLA-qualifying reasons.**

If an eligible employee does not take all of his or her 26 workweeks during the "single 12-month period", the remaining part of the 26 workweek entitlement is forfeited.

The 26 workweek entitlement is applied on a per-covered servicemember, per-injury basis. Consequently, an eligible employee may be entitled to take more than one period of 26 workweeks if the leave is to care for a different covered servicemember or to care for the same covered servicemember with a subsequent injury or illness.

NOTE: An eligible employee's FMLA entitlement is limited to a total of 26 workweeks of leave during a "single 12-month period" to care for a covered servicemember with a

serious injury or illness. The "single 12-month period" must be measured forward from the date an employee's first FMLA leave to care for the covered servicemember begins.

During the "single 12-month period", an eligible employee's FMLA leave entitlement is limited to a combined total of 26 workweeks of FMLA leave for any qualifying reason.

Total Leave for Husband & Wife

The total number of workweeks to which a husband and wife working for the same employer may be entitled may be limited to 26 workweeks during the single 12-month period if the leave is taken under the Servicemember Family Leave provision or a combination of leave under the Servicemember Family Leave and leave for the following reasons:

1. Birth of a child of the employee and to care for such child;

2. Placement of a child with the employee for adoption or foster care;

3. For the employee to care for his or her own parent who has a serious health condition;

4. Because of the employee's own serious health condition; or

5. To care for a covered servicemember with a serious injury or illness.

Intermittent or Reduced Schedule Basis

The Servicemember Family Leave may be taken intermittently or on a reduced leave schedule.

Servicemember Leave Certification Requirements

When an employee requests servicemember leave, an employer may require an employee to obtain a certification completed by an authorized health care provider of the servicemember. The following health care providers are authorized to complete the certification.

1. A United States Department of Defense ("DOD") health care provider.

2. A United States Department of Veterans Affairs ("VA") health care provider.

3. A DOD TRICARE network authorized private heath care provider.

4. A DOD non-network TRICARE authorized health care provider.

An employer may request that the health care provider furnish the information noted below.

- The health care provider's name, address, and appropriate contact information. In addition the employer may request information concerning the health care provider's medical specialty and whether the health care provider is authorized to complete the certification.

- Whether the covered servicemember's injury or illness was incurred in the line of duty on active duty.

- The approximate date on which the serious injury or illness commenced and its probable duration.

- A statement or description of appropriate medical facts regarding the covered servicemember's health condition for which FMLA is being requested. Such medical facts must be sufficient to support the need for leave.

- Information sufficient to establish the covered servicemember is in need of care and whether the covered servicemember will need care for a single continuous period of time, including any time for treatment and recovery, and an estimate as to the beginning and ending dates for this period of time.

- If an employee requests leave on an intermittent or reduced schedule basis for planned medical treatment appointments for the covered servicemember, whether there is a medical necessity for the covered servicemember to have such periodic care and an estimate of the treatment schedule of such appointments.

- If an employee requests leave on an intermittent or reduced schedule basis to care for a covered servicemember other than for planned treatment (e.g. episodic flare-ups of a medical condition), whether there is a medical necessity for the covered servicemember to have such periodic care, which can include assisting in the covered servicemember's recovery, and an estimate of the frequency and duration of the periodic care.

In addition to the information that an employer may request from a health care provider, the employer may request the following from the employee and/or covered servicemember be included in the certification.

- The name of the covered servicemember for whom the employee is requesting leave.

- The relationship of the employee to the covered servicemember for whom the employee is requesting leave.

- 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.

- Whether the covered servicemember is assigned to a military facility as an outpatient.

- Whether the covered servicemember is on a temporary disability retired list.

- A description of the care to be provided to the covered servicemember and an estimate of the leave time needed to provide the care.

In the final regulations, the DOL has provided a model form for use in obtaining certification "that meets FMLA's certification requirements." **Form WH-385 "Certification for Serious Injury or Illness of Covered Servicemember for Military Family Leave" may be located in Appendix H of the final regulations.** Form WH-385 or another form containing the same basic information may be used by the employer; however, no information beyond what is specified on Form WH-385 may be required.

In addition, an employer requiring an employee to submit certification for leave to care for a covered servicemember must accept as sufficient certification in lieu of WH-385 or the employer's in-house form "invitational travel orders" (ITO's) or "invitational travel authorizations" (ITA's). An ITO or ITA is sufficient certification for the times specified in the ITO or ITA.

An employer may seek authentication and authorization of the ITO or ITA but may not utilize the second or third opinion process.

In all instances in which the certification is requested, it is the employee's responsibility to provide the employer with complete and sufficient certifications and failure to do so may result in the denial of FMLA leave.

In all circumstances, including for leave taken to care for a covered servicemember, the employer is responsible for designating leave, paid or unpaid, as FMLA-qualifying, and for giving notice of the designation to the employee.

For a copy of the final FMLA regulations, please click on the link provided below:

http://www.dol.gov/federalregister/PdfDisplay.aspx?DocId=21763

2009 MEDICAL MILEAGE RATE ANNOUNCED BY IRS

Transportation expenses, such as automobile mileage that qualify as tax deductible medical expenses under Internal Revenue Code Section 213 generally can be paid or reimbursed on a tax-free basis by a health flexible spending arrangement, health reimbursement arrangement, or health savings account if the expense is "primarily for, and essential to, medical care."

On November 24, 2008, the Internal Revenue Service via Revenue Procedure 2008-82 announced that the standard mileage rate for use of an automobile to obtain medical care is 24 cents per mile for 2009, effective January 1, 2009. This represents a decrease of three cents from the last six months of 2008 rate of 27 cents per mile.

For a copy of Revenue Procedure 2008-72, please click on the link provide below:

http://www.irs.gov/pub/irs-drop/rp-08-72.pdf

TRANSITION RELIEF PROVIDED BY IRS REGARDING THE USE OF ELECTRONIC PAYMENT CARDS AT DRUG STORES AND PHARMACIES

The Internal Revenue Service (IRS) in January 2007 released further guidance on the use of electronic payment cards (Card) in conjunction with reimbursing eligible expenses under a health flexible spending account (Health FSA) or health reimbursement arrangements (HRA). Notice 2007-2 provided that as of January 1, 2009, the Card could NOT be used at stores with a drug store or pharmacy merchant category code (MCC) unless the store utilizes inventory information approval system (IIAS) technology or the store location sales from the previous tax year consist of items of which at least 90% are considered medical expenses under Internal Revenue Code Section 213.

On December 4, 2008, the IRS issued Notice 2008-104, providing transition relief for health FSA and HRA debit card transactions at stores with a drug store or pharmacy merchant MCC. Under this relief, the effective date of the restrictions has been extended by an additional six months. Effective July 1, 2009 health FSA and HRA debit cards may not be used at stores with the drug store and pharmacies MCC unless the store utilizes IIAS technology or the store location sales from the previous tax year consist of items of which at least 90% are considered Section 213 medical expenses. Until then, drug store and pharmacy merchants may continue to accept debit card transactions based on the standard substantiation requirements.

For a copy of Notice 2008-104 please click on the link provided below:

http://www.irs.gov/pub/irs-drop/n-08-104.pdf

For further information regarding the use of electronic payment cards for health FSA expense reimbursement, please click on the links to previous versions of the ADP Tech Flex.

July 2006 Tech Flex

January 2007 Tech Flex

IRS RELEASES 2009 AUTOMOBILE BUSINESS USE MILEAGE RATE

The Internal Revenue Service, on November 24, 2008, issued via Revenue Procedure 2008-82 the 2009 optional standard mileage rates used to calculate the deductible costs of operating an automobile for business, charitable, and moving purposes.

As of January 1, 2009, the standard mileage rates for the use of a car (including vans, pickups or panel trucks) will be:

- 55 cents per mile for business miles driven;
- 24 cents per mile driven for moving purposes; and
- 14 cents per mile driven in service to a charitable organization.

The new rate for business miles compares to a rate of 58.5 cents per mile for the last six months of 2008, a decrease of 3.5 cents per mile. The new rate of 24 cents per mile for moving purposes compares to 19 cents in 2008, an increase of 5 cents per mile.

The standard mileage rates for business and moving purposes are based on an annual study of the fixed and variable costs of operating an automobile. The mileage rate for charitable miles is set by statute and remains at 14 cents per mile.

For a copy of Revenue Procedure 2008-82, please click on the link provide below:

http://www.irs.gov/pub/irs-drop/rp-08-72.pdf

FLORIDA INCREASES MINIMUM WAGE

As of January 1, 2009, the minimum wage rate in Florida will be raised from $6.79 per hour to $7.21 per hour.

In addition, the tipped employee minimum hourly rate in Florida will increase from $3.77 per hour to $4.19 per hour in direct (cash) wages. The maximum tip credit will remain at $3.02 per hour ($4.00 + $3.02 = $7.02).

The Florida training/youth wage rate will remain at the rate of $4.25 per hour.

Please contact ADP National Account Services for further information at:
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