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The U.S. Department of Labor Proposes New FMLA Regulations

On February 11, 2008, the United States Department of Labor ("Department") issued a Notice of Proposed Rulemaking proposing revisions to the Family and Medical Leave Act ("FMLA") regulations. The proposal would amend rules that the Labor Department published following enactment of the 1993 federal law, which currently requires employers to provide up to 12 weeks of unpaid, job-protected leave in a year for the birth or adoption of a child; to care for a sick child, parent or spouse; or when an employee has a serious illness. These newly proposed FMLA regulations are not yet final or effective. There is a 60-day comment period, until midnight on April 11, 2008, within which the Department will receive comments in response to its proposed regulations. Employers are therefore cautioned that the proposed regulations are subject to modifications at the end of the public comment period. The Notice of Proposed Rulemaking and request for comments can be found on the Department's website at: http://www.dol.gov/esa/whd/FMLANPRM.htm.

The proposed changes are in response to a myriad of court decisions interpreting and/or invalidating the regulations, the Department's 15 years of history, and the myriad of comments received from the public. Following is a summary of the major proposed changes to the regulations.

Eligibility

The proposed regulations clarify when to count the 12 months and 1250 hours of leave for purposes of determining eligibility, and confirm that an employee may become eligible while on leave. More specifically,

- the proposed regulations would require a determination "as of the date the FMLA leave is to start" instead of the current determination which is made "as of the date the leave commences"
- employment periods preceding a break in service of 5 years or more need not be counted unless:
  - Military service (which currently counts toward the 1250 and one year), or
  - By written agreement (including but not limited to collective bargaining agreements)

Serious Health Condition

The six individual definitions of "serious health condition" are retained, but the Department provided further clarification of two of the regulatory terms:

- an employee who is incapacitated for more than three consecutive days must receive treatment from a health care provider on two or more occasions within a 30-day calendar period unless there are "extenuating circumstances"

- an employee with a "chronic condition" would be required to visit a health care provider for the condition at least twice each year

Despite many comments from employers, no changes were proposed to the contradictory "self treatment" provision for "chronic conditions" which allows for leave even though the employee or the family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three days. See29 C.F.R.§ 825.114(e).

Leave Needed to Care for Family Member

The current regulations discuss what it means that an employee is needed to care for a family member. The proposed regulations specifically state and clarify that an employee need not be the only family member available when requesting leave to care for a family member.

Definition of Healthcare Provider

The Department proposed what is coined as a "conforming change" to recognize physician assistants as "health care providers".

Medical Certification

The significant proposed changes to the medical certification provisions would allow an employer to obtain more information from health care providers.

Recertification

Currently, the regulations limit an employer's ability to ask for recertification in many cases to situations when there are changed circumstances, an extension request or receipt of information that casts doubt on the employee's stated reason for leave.

Under the proposed regulations, the employer may ask for recertification at least every six months if the employee is absent during that period.

Adequacy of Medical Certification

The current regulations allow a healthcare provider representing an employer to request clarification of the medical certification, with permission of the employee. The proposed regulations would allow the employer to contact the employee's healthcare provider directly to request clarification of the medical certification, but only after the employer advised the employee in writing of incompleteness (missing information) or insufficiency (vague, non-responsive, ambiguous) and information needed, and would allow the employee an opportunity (7 days) to correct the deficiency on the certification. In addition, the proposed regulations provide that if the employee does not correct or provide HIPAA authorization to permit employer to seek correction, or if the certification deficiency is not remedied, leave could be denied.

Content of Medical Certification

A new medical certification form is also proposed by the Department. This form contains a significant change in the third section directed to the health care provider and would require specific medical and treatment information that must be filled out by the provider, such as:

- a description of "any other relevant medical facts," which permits but does not require a diagnosis, and
- additional information, if allowed under the Americans with Disabilities Act, workers' compensation laws or benefit plans

The proposed regulations indicate that the employee would be held responsible for providing the employer with complete and sufficient certification unless the employee authorizes direct communication with healthcare provider.

Notice by Employees

The current regulations indicate that an employee need only indicate an FMLA condition to trigger

FMLA protection. The new regulations would require much more by way of notice including:

- an indication that the condition renders the employee unable to work (or needed to care for a family member), but the employee is still not required to mention the FMLA by name,
- an anticipated duration of the absence,
- if the employee (or family member) intends to visit a health care provider, and
- communication to the employer must be according to "usual and customary" procedures, except under "unusual situations", i.e. an employer could require an employee to call a designated number or a specific individual to request leave.

Notice by Employers
The proposed changes to the employer notice obligations are as follows:

- an employer is allowed five business days, instead of the current two business days, to give written notice of eligibility and designation of FMLA leave to an employee;
- an ineligible employee must be provided an explanation of the reason(s) for ineligibility and an eligible employee must be informed whether any remaining FMLA leave is available and any additional responsibilities of the employee (e.g. medical certification)
- if the medical certification is incomplete (information missing) or insufficient (vague, non-responsive, ambiguous), it must be returned to the employee with details regarding what is lacking and allow the employee 7 days to cure any deficiency

Furthermore, the Department clarified whether there are penalties for an employer's failure to properly designate leave as a result of a U.S. Supreme Court decision invalidating such provisions in the current regulations. The Department proposes to delete the current penalty provisions and modify these provisions as follows:

- an employer can retroactively designate FMLA leave, with appropriate notice, form and content, if such later designation does not cause "harm or injury" to the employee;
- if the proper notice requirements are not followed, an employer may be liable to the employee for interference with FMLA rights

Intermittent Leave

The Department provided no substantive, proposed changes or useful guidance regarding a major concern of employers - unscheduled, intermittent leave. As some commenters pointed out, these workers can repeatedly take unscheduled intermittent leave, over nine hours per week, and still not exhaust their allocation of FMLA leave for the year (generally, 12 weeks x 40 hours/week = 480 hours). Additionally, intermittent leave can disproportionably impact operations in certain industries (e.g. production, transportation, etc.) by just a few employees who repeatedly take unscheduled intermittent leave. In lieu of proposing concrete substantive changes in this area, the Department recommended the deletion of the "as soon as practicable" language (interpreted as "ordinarily one or two business days") and instead, proposed changes in this section of the regulations that would require:

- notice to an employer the same day or the next business day (inferred by the deletion of the language "as soon as practicable"); and
- if the employee gives less than 30 days notice, the employee would be required to explain why it was not practicable to give such notice.

In addition, the current regulations provide that an employee needing intermittent leave must "attempt to schedule" such leave so as not to "disrupt" the employer's operations. The Department proposed a slight change in the language that would require an employee to make a "reasonable effort" to schedule the leave so as not to "unduly disrupt" the employer's operations.

Light Duty

The proposed regulations clarify that if an employee is on "light duty," the employee would not be

considered on FMLA leave.

Perfect Attendance Awards

Currently, the regulations provide that an employer cannot deny a perfect attendance bonus to an employee on FMLA leave. Many employers found this to be illogical and frustrating and the new regulations proposed to correct this by clarifying that:

- bonuses could be properly "based on the achievement of a specified goal such as hours worked, products sold or perfect attendance"; and
- such bonuses could be denied to employees who have not met the goal because of FMLA leave as long as employees with non-FMLA absences are treated the same

Waiver of Rights

The current regulations prohibit an employee from waiving his or her FMLA rights. The new regulations propose modifying this section by permitting employers to obtain employee waivers of past FMLA claims and such waivers would not require Department or Court approval as previously found by some courts.

Substitution of Paid Leave

The current and proposed regulations require that all forms of paid leave be treated the same. The Department clarifies in the proposed regulations that an employer can require, or an employee can elect, to substitute paid leave when the employee meets the requirements of the employer's paid leave policy; however, an employer cannot discriminate against FMLA in the administration of leave policies.

Fitness for Duty Certificates

Under the current regulations, employers are permitted to request certification that an employee is able to return to work pursuant to a uniformly applied policy. The proposed regulations clarify and add that:

- the employee's ability to perform the essential functions of the job can be required to be addressed in the certification if the employer lists them in the designation notice; and
- where reasonable job safety concerns exist, an employer can require fitness for duty certification for intermittent leave up to once every 30 days

Holidays

Currently, if a holiday falls during a week of FMLA leave, an employer is permitted to count the entire week as FMLA time. The proposed regulations modify this provision as follows:

- if an employee uses FMLA increments of less than a week, holidays may not be counted unless the employee was scheduled to work; and
- if leave is taken in increments of one week or longer, the holiday may be counted as FMLA leave

Click here to read more information on Family Leave for Family Members of Injured Military Personnel.

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