PUBLICATION

Department of Labor Issues Proposed FMLA Regulations

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On February 11, 2008, the Department of Labor (DOL) issued much-anticipated proposed regulations impacting the Family and Medical Leave Act (FMLA). These rules, which seek to clarify existing regulations, are open for public comment for a 60 day period.

Additionally, although these proposed regulations do not include specific proposals for implementing the new leave provisions for family members of military personnel, the DOL does seek public comments on such rules.

While the proposed regulations do not provide as much relief from administrative burdens and confusion as employers had hoped, it is important that employers understand the major areas of difference between them and the existing regulations.

Employee Eligibility Standards

In order to be eligible for FMLA leave, an employee must have twelve months of service with his or her employer and have worked at least 1,250 hours during that twelve month period. The months of service need not be consecutive, but the proposed regulations clarify that employers are not required to count prior periods of employment which occurred before a break in service of more than five years. Exceptions are made to this rule, however, for military service or certain other approved periods of unpaid leave after which the employer has agreed in writing to reinstate the employee. Similar exceptions are made to the requirement that employees must have worked 1,250 hours in order to be eligible.

Serious Health Condition

Despite numerous requests from employers and health care providers to clarify the definition of a "serious health condition," the DOL made very few revisions to this area of the regulations. Currently, the regulations provide for leave in connection with a period of incapacity of more than three consecutive calendar days so long as the employee or family member has either: (a) one visit to a health care provider plus continuing treatment, or (b) two visits to a health care provider. The proposed regulations clarify that the two visits to a health care provider must occur within 30 days of the beginning of the period of incapacity unless extenuating circumstances exist.

The current regulations also allow for leave in the event of a chronic serious health condition. The proposed regulations specify that in order for a condition to qualify under this definition, it must require at least two or more periodic visits to a health care provider for treatment each year.

Waiver of Rights

The FMLA specifically prevents employees from waiving their rights under the statute. Under the current regulations, confusion developed among the courts over whether this prohibition only covered prospective waivers or also included retroactive waivers, such as those contained in settlement and severance agreements. The proposed regulations clarify that while employees may not prospectively waive their rights

under the FMLA, they are permitted to waive FMLA rights retroactively with or without the approval of the courts or the Department of Labor.

Employer Notice to Employees

Under the current regulations, employers are required to designate leave as FMLA-qualifying within two business days absent extenuating circumstances. The proposed regulations extend this period and require that employers notify employees whether a planned leave will be FMLA-qualified within five business days of learning of the employee's potential FMLA-qualifying condition.

The DOL proposes that this notice to employees include eligibility information, employee responsibilities and the consequences to an employee in the event of noncompliance. Additionally, if a planned leave is found to be non-qualifying, the employer must explain why in the notice. To assist in implementing these changes, the DOL has further proposed a new template notice form.

Finally, following the U.S. Supreme Court's decision in *Ragsdale v. Wolverine Worldwide, Inc.*, the proposed regulations clarify that employers may retroactively designate leave as FMLA-qualifying, provided doing so does not cause harm or injury to the employee.

Employee Notice to Employers

Existing regulations provide that an employee does not need to mention the FMLA specifically in order to invoke its protection. In response to comments from employers, the proposed regulations do, however, require employees to provide specific information to employers before the employer's FMLA responsibilities are triggered. Specifically, the proposed regulations provide that an employee's notice of leave should include: (a) some indication that a condition renders the employee or family member unable to work; (b) an estimated duration of the absence; and (c) whether the employee or family member plans to visit a health care provider. Moreover, the proposed regulations clearly provide that an employee cannot trigger the employer's obligations to further investigate whether an absence is FMLA-qualifying simply by calling in sick.

The proposed regulations further provide that employees must respond to inquiries by their employers for the purpose of determining whether an absence is FMLA-qualifying. If they do not, denial of FMLA leave is appropriate.

Medical Certifications

The proposed regulations clarify that "sufficient medical facts" to support the existence of a serious health condition may include information about symptoms, hospitalization, doctors' visits, prescription medication, referrals for evaluation or treatment, or any other regimen of continuing treatment. Additionally, the proposed regulations clarify that health care providers may provide information on the diagnosis of the patient's health condition, but are not required to do so in order to complete the certification form. In an attempt to streamline the medical certification process, the Department of Labor has also proposed a new medical certification form.

Contact with Health Care Providers

Current regulations generally prohibit contact between employers and health care providers. The proposed regulations, however, create an exception which permits employers to contact physicians directly if "an employee's serious health condition may also be a disability within the meaning of the Americans with Disabilities Act." Employers choosing to avail themselves of this exception, however, must be mindful to follow

the additional restrictions imposed by the ADA. An employer may also contact an employee's health care provider to seek "clarification and authentication" of medical certifications.

Fitness for Duty Certifications

In response to numerous comments from employers, the proposed regulations remove the provision that a fitness-for-duty certification must only be a "simple statement." In its place, the DOL proposes to reinsert the original statutory standard requiring the employee to submit a certification from their health care provider stating that they are able to resume work. To further allay safety concerns, employers are permitted to provide employees with a list of their essential job duties. This list must be provided along with the eligibility notice and must be accompanied by notification to employees that a fitness-for-duty certification is required. If such a list of essential functions is provided, the employer is permitted to require the employee's health care provider to certify that the employee can perform each individual duty on the list before allowing the employee to return to work.