

Highlights of New Proposed FMLA Regulations published February 11, 2008

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On February 11, 2008, the U.S. DOL issued a Notice of Proposed Rulemaking containing proposed revisions to the current FMLA regulations. DOL is seeking public comments until April 11, 2008, and will issue final regulations after it has had an opportunity to catalog, review and make decisions regarding the comments it receives. DOL has indicated that final rules may be issued as soon as the Fall of 2008, and would take effect 30 days thereafter.

The proposed regulations are reorganized by topic. Some matters are consolidated into “one-stop” sections; for example, employer notice requirements are contained in a single section. In addition, the regulatory sections have been re-named to more readily identify them by topic.

Significantly, DOL has responded specifically to several high-profile cases, stating 1) that employees have the right to waive and settle past FMLA claims without DOL or court approval (in response to Taylor v. Progress Energy, 4th Circuit 2007), and 2) that where an employer initially fails to provide sufficient notice, it may retroactively designate leave, and it may be subject to penalties only if the employee can demonstrate individualized harm (in response to Ragsdale v. Wolverine, U.S. Supreme Court 2002). Other highlights of the proposed regulations include the following:

Eligible Employees

DOL has proposed that for purposes of meeting the 12-month eligibility requirement, when employment is not continuous, employment prior to a break in service of 5 years or more need not be counted for purposes of eligibility unless the break in service was due to military leave or there is a collective bargaining agreement or other written agreement showing an intent to re-hire the employee. DOL has also clarified that for purposes of meeting the 12-month eligibility requirement, if an employee is on leave, the period of leave prior to the 12-month mark is not FMLA leave, but the period of leave after the 12-month mark is FMLA protected.

Serious Health Condition

The proposed regulations include physician assistants in the list of health care providers. For purposes of analyzing “continuing treatment” which consists of 2 or more visits to a health care provider, the 2 visits must occur within 30 days of the beginning of the incapacity unless extenuating circumstances exist (such as difficulty in scheduling an

appointment). For chronic serious health conditions, “periodic treatment” is defined as 2 or more visits to a health care provider within one year.

Notice Requirements

DOL has clarified that an employer has an obligation to provide a general notice, an eligibility notice, a designation notice, and a notice of consequences for failure to comply. The general notice includes a posting which must be posted by a covered employer even if no employees are eligible, and a policy to be included in employee handbooks. The eligibility notice must state whether the employee is eligible to take FMLA leave and if not, provide a reason why. The eligibility notice must also include a statement of the employee’s rights and responsibilities, including the requirement to submit a medical certification, to pay insurance premiums, and to provide periodic reports of status and intent to return to work and the right to job restoration. The eligibility notice must also state whether the employee will be required to submit a fitness-for-duty release and if so, whether the release must state that the employee is able to perform the essential functions of the job; if the employer requires the health care provider to certify that the employee is able to perform the essential functions of the job, the employer must include a job description containing a list of essential functions along with the eligibility notice. The designation notice must indicate the number of days or hours available to the employee. The requirement to give notice has generally been extended from 2 business days to 5 business days.

Medical Certification and Recertification

In conjunction with the proposed regulations, DOL has issued a new proposed Medical Certification Form (WH-380). The proposed regulations permit health care providers to provide a diagnosis (in order, for example, to effectively and efficiently communicate the nature of the incapacity), but clarify that if the medical facts establish that the employee’s condition qualifies as a serious health condition, no diagnosis is required. DOL proposes to allow employers to have direct contact with the health care provider if permitted to do so under workers compensation statutes or for purposes of authenticating the certification. An “incomplete certification” is defined under the proposal as one in which all of the entries have not been completed, and an “insufficient certification” is one in which the responses are “vague, ambiguous or non-responsive.” In either case, the proposed regulations required the employer to give the employee notice of the deficiencies, specifically stating what information is necessary, and 7 days to cure. The employer may contact the health care provider for purposes of clarification only after giving notice and an opportunity to cure, and then, only if the employee provides a HIPAA-compliant release. If the employee refuses, FMLA leave may be denied. The proposed regulations state that recertification may be obtained no more often than every 30 days, but may be requested every 6 months even if a minimum period of capacity is specified, or fewer than 30 days if the employee requests an extension, circumstances have changed significantly, or the employer receives information that casts doubt on the employee’s stated reason for leave. In addition, the proposed regulations clarify that an employer may ask the health care

provider confirm whether a pattern of absences (such as a Monday-Friday pattern) is consistent with the employee's medical condition.

Intermittent Leave

DOL has declined to increase the minimum increment of time that intermittent leave can be used. The proposed regulations require that employers must notify employees who take FMLA on an intermittent basis of how much leave they have used and have remaining every 30 days if the employee took intermittent leave during that 30 day period. DOL states that when employees give less than 30 days notice of their need for foreseeable intermittent leave, the meaning of the rule which requires "as soon as practicable" is that notice is expected to be given the same day or next day (not within 2 business days under the current interpretation) and explain why if it is not. Notice for unforeseeable leave must be given "as soon as practicable" as well, but in this case it means "promptly" under the circumstances. The proposed regulations state that an employee's notice will be sufficient if it indicates the employee cannot perform the functions of the job, the anticipated duration, and whether the employee intends to visit a health care provider or is receiving continuing treatment. The employer is required to inquire further if notice is not sufficient. Under the proposed regulations, an employee must make a "reasonable effort" to take intermittent leave so the absence does not disrupt operations (not an "attempt" as under the current rules). DOL proposes to permit employers to require a fitness-for-duty release every 30 days if an employee has taken intermittent leave during that period and reasonable safety concerns exist.

Call-in Procedures and other Employer Policies

The proposed regulations state that employees may be required to follow the employer's established call-in procedures, and allow employers to impose whatever discipline the employer's rules permit and delay or deny FMLA leave when an employee fails to comply. In addition, the proposed regulations permit employers to require employees to substituted paid leave (running concurrently with FMLA leave) and to comply with all of the terms and conditions associated with all forms of paid leave. Employers must give employees notice of the requirement to substitute paid leave and inform the employee of the choice to take unpaid FMLA leave.

Family Leave

For family leave, whether a son or daughter meets the definition is determined at the time leave is to commence, a statement from an employee to establish a family relationship may be notarized and sworn, a tax return may be used to establish an "in loco parentis" relationship, and when an employee needs to take time to provide care for a family member, the employee must be permitted to take leave even if s/he is not the only family member available.

Other Issues

The proposed regulations also 1) provide clarification regarding worksites for joint employees, 2) indicate that time worked on light duty may not count as FMLA (but hours not worked due to a reduced schedule may), 3) state that an employee on FMLA has the right not to work scheduled overtime hours and the time not worked is counted as reduced schedule, 4) state that a perfect attendance bonus may be withheld from an employee who takes FMLA leave so long as all others who take any other leave are not eligible for the bonus, 5) clarify that if a holiday occurs in a week in which the employee takes a partial week of FMLA, the holiday hours do not count against FMLA (but they do if the employee takes a full week of FMLA), and 6) provide guidance on how the FMLA relates to the Americans with Disabilities Act (ADA) and the Uniformed Services Employment and Reemployment Rights Act (USERRA). With respect to HIPAA, DOL states that if the health care provider gives the employee the form to submit to the employers, then HIPAA does not apply, but if the health care provider sends the information directly to the employer, a HIPAA-compliant authorization is required.

New Military Family Leave Amendments

The Notice Proposed Rulemaking does not contain proposed regulations under the recently enacted provisions for Military Family Leave, but it does pose questions and solicit comments. Specifically, for example, DOL asks for comments on how “next of kin” and “nearest blood relative” should be defined; whether “son or daughter” should include adult servicemembers; whether there should be a temporal proximity between the servicemember’s illness or injury and the treatment, therapy or recuperation; what should constitute a “qualifying exigency” for purposes of active duty leave; how the 12-month period should be calculated, and how the 26 weeks of caregiver leave should be applied. With these unanswered questions and acknowledging the immediate need for regulations, DOL has indicated that it intends to skip issuing proposed regulations governing the Military Family Leave provisions and instead issue final regulations when the rest of the proposed regulations are made final.

Additional information, including a copy of the Proposed Regulations, a Fact Sheet and Frequently Asked Questions, is available at <http://www.dol.gov/esa/whd/FMLANPRM.htm>. To contact Laura Bailey Gallagher, Esq., call 717-291-2236 or email lgallagher@h-dlaw.com.

*This information is intended to be general information and not specific legal advice.
For particular questions, you should consult legal counsel.*