

February 19, 2008

## DOL Issues Proposed Changes to FMLA Regulations

The year started with amendments to the Family and Medical Leave Act ("FMLA") that expanded the Act's protections for the families of military service members. On February 11, 2008, the Department of Labor ("DOL") continued the focus on the FMLA by publishing proposed changes to the FMLA regulations. The DOL's report on the proposed rules, at over 470 pages, addresses some of the concerns with the regulations that employers expressed when the DOL first sought public comments on the regulations in December 2006. However, the proposed rules leave one of the most administratively difficult aspects of the FMLA regulations -- intermittent leave -- essentially unchanged.

The proposed rules contain modifications to many provisions of the current regulations, including required notices, the definition of "serious health condition," certification, re-certification, bonuses, voluntary settlement of claims, and other matters. A link to the text of the proposed rules can be found at: <http://www.dol.gov/esa/whd/fmla/>

### Several of the key modifications are detailed below:

- **Notice Requirements for Employers:** The proposed rules would require that employers provide a notice explaining the FMLA's provisions and complaint-filing procedures in employee handbooks or by distributing a copy at least once a year. Employers must also provide employees with a notice regarding designation of FMLA leave -- referred to as the "designation notice" -- within five business days of having obtained sufficient information to determine whether the requested leave is being taken for a qualifying reason.
- **Notice Requirements for Employees:** The proposed rules clarify that an employee giving notice of need for FMLA leave must explain the reasons for the needed leave so that the employer can determine if it is FMLA qualifying. If the employee fails to explain the reasons for leave, leave may be denied. The proposed regulations also clarify that employees must respond to an employer's questions to determine whether leave is potentially FMLA-qualifying. Failure to respond to an employer's reasonable inquiries regarding the leave may result in denial of FMLA protection if the employer is unable to determine whether the leave is FMLA-qualifying.
- **Serious Health Condition Definition:** While the DOL received numerous public comments about the definition of "serious health condition," the report on the proposed rules notes that the definition is retained with only "slight modifications." Rather than re-write the definition, the DOL believes it has addressed confusion with the term "serious health condition" by reorganizing the definition's structure without changing the substantive content. The DOL's hope is that this "re-organization" will help "both employees and employers [to] better understand what constitutes a serious health condition." The proposed rules would change the meaning of "continuing treatment" by specifying that the two visits to a healthcare provider, required under one element of the current definition, must occur within 30 days of the beginning of incapacity, unless extenuating circumstances exist. Currently, the time-period is open-ended.
- **New Medical Certification Form Proposed:** During the 2006 public comments, the FMLA Medical Certification Form, WH-380, came under heavy criticism. As a result, the proposed regulations include a completely revised medical certification form. The changes are intended to simplify the form and obtain the information needed to grant or deny leave.
- **Authentication and Clarification of Medical Certification:** The current regulations make it cumbersome for employers to authenticate or clarify a medical certification form by requiring: 1) that the employer obtain an employee's permission before contacting the employee's health care provider, and 2) that the employer's healthcare provider, not the employer, contact the employee's treater. The proposed regulations would allow employers to contact healthcare providers directly for purposes of authenticating or clarifying a medical certification, eliminating the requirement that employers use an intermediary at this stage.
- **Recertification Requirements Clarified:** Under the current FMLA regulations, employers often find themselves confused about how frequently they can obtain recertification of serious health conditions. The proposed regulations provide that in most cases an employer may request recertification no more often than every thirty

days and only in connection with an employee's absence. In addition, if the minimum duration of incapacity on the initial medical certification is more than thirty days, employers must wait until that minimum duration expires before requesting recertification. When serious medical conditions are expected to last for extended periods or when the health care providers state an "indefinite" or "unknown" period on medical certification forms, employers may request recertification every six months, which many employers will find to be more restrictive than their current practices.

- **Employees Must Make "Reasonable Efforts" Not to Disrupt Operations with Intermittent Leave:** The FMLA regulations currently provide that an employee should "attempt" to avoid disruption of the employer's operations in scheduling intermittent leave. The new rules would re-enforce that requirement by providing that employees "make a reasonable effort" when scheduling intermittent leave time to avoid disruption of the employer's operations.
- **Employer Call-In Procedures for FMLA Absences:** The proposed rules do address an aspect of the current regulations that employers have found troubling: advance notice of use of "unforeseeable" FMLA leave time. The current regulations allow employees up to two days to notify the employer of an FMLA covered absence. The proposed rules provide that "absent unusual circumstances, the employer may require employees to follow established call-in procedures (except ones that impose a more stringent timing requirement than the regulations provide)," and that failure to properly notify employers of absences may cause a delay or denial of FMLA protections. Unusual circumstances would include situations when an "employee is hospitalized and his/her spouse calls the supervisor to report the absence, unaware that the attendance policy requires that the human resources department be called instead of the supervisor."
- **Attendance Bonuses & Incentive Rewards:** The current FMLA regulations require employers to pay perfect attendance bonuses to employees who have missed time from work for FMLA-covered reasons. The proposed regulations would allow employers to "disqualify an employee from a bonus or award predicated on the achievement of a goal where the employee fails to achieve that goal as a result of an FMLA absence." The specified goals may include hours worked, products sold or perfect attendance. The employer could deny the bonus or award if the employee has not met the goal due to FMLA leave. Of course, FMLA leave would need to be treated in the same manner as any other leave for bonus/incentive purposes.
- **Return to Work Certification:** Under the current regulations, at the end of an FMLA leave employers cannot require more than a simple statement that the employee is able to return to work. The proposed regulations would allow the employer to require that an employee returning from an FMLA leave obtain a certification from the health care provider that the employee is able to resume work. The employer may provide a list of essential functions and require that the employee's health care provider certify that the employee can perform the essential functions when completing the fitness-for-duty certification. In addition, the proposed regulations would allow an employer to require an employee to furnish a fitness-for-duty certification every 30 days if an employee used intermittent leave during the period and "reasonable safety" concerns exist.
- **Private Settlement of Past FMLA Claims Allowed:** The DOL's proposal also clarifies the current regulations, which state that "[e]mployees cannot waive, nor may employers induce employees to waive, their rights under FMLA," by adding an explicit provision that employees and employers are permitted to voluntarily settle past claims without first obtaining permission or approval from the DOL or a court.
- **Leave for Family of Military Service Members:** The DOL is also seeking public comments on issues to be addressed in its final regulations covering military family leave. The statutory amendments providing FMLA leave to care for a covered service member became effective January 28, 2008. The amendment providing FMLA leave for "qualifying exigencies" as the result of a family member's active duty or call to active duty are not effective until the DOL issues regulations defining "qualified exigencies." The DOL has issued a Notice regarding these amendments that employers should post. The Notice is located at: [www.dol.gov/esa/whd/fmla/NDAAAmndmnts.pdf](http://www.dol.gov/esa/whd/fmla/NDAAAmndmnts.pdf).

#### **Next Steps in the Rulemaking Process:**

The DOL is accepting public comments on the proposed rules through April 11, 2008. Committees for both the House of Representatives and the Senate have scheduled hearings on the proposed rules. Typically, following the comment period the proposed rules become final regulations with some minor modifications. The DOL will usually publish a response to issues raised during the public comment period along with an updated analysis and final justification for the rules. In some cases, the DOL may publish a second draft of the proposed rule, especially if the Agency has made substantial changes to the proposed rules that raise new issues for public comment. Except in extraordinary circumstances, the final regulations do not become effective for some period after the initial publication to allow affected parties an opportunity to comply.

**What Should Employers Do:**

- Train HR professionals and managers about the new FMLA provisions for military family members. Advise employees of the new provisions and post the DOL Notice.
- Submit any comments regarding the proposed FMLA rules to the DOL by April 11th.
- Become familiar with the many changes in the proposed FMLA regulations and consider the implications of those changes on other employment policies (e.g., Call-in Procedures, Attendance Bonus practices).
- Focus on reviewing and, if necessary, updating job descriptions that describe essential job functions, which will likely take on increased importance in the initial certification and fitness-for-duty process.
- Contact your Butzel Long attorney with any questions that you may have regarding the proposed regulations, the military family amendments, and related policy revisions.

If you have any questions regarding the Family and Medical Leave Act or the proposed changes to the FMLA regulations, please contact the author of this E-News bulletin as indicated below or your Butzel Long attorney.

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