



## Legal Alert: DOL Proposes Revisions to FMLA Regulations and Seeks Comments on Military Family Leave

2/18/2008

The Department of Labor (DOL) has published a Notice of Proposed Rulemaking (NPRM) proposing revisions to certain regulations implementing the Family and Medical Leave Act (FMLA). The NPRM addresses many of the comments received by the DOL in response to its Request for Information published in December 2006, as well as legal challenges to many provisions in the current regulations. The DOL also included a Request for Comments on issues to be addressed in final regulations regarding military family leave. The NPRM is available from the DOL's website at: <http://www.dol.gov/esa/whd/fmla/FedRegNPRM.pdf>.

The FMLA requires covered employers to provide up to twelve weeks of unpaid leave in a twelve-month period to eligible employees for the birth or placement of a child for adoption or foster care or when the employee is unable to work because of the employee's own serious health condition or to care for a spouse, parent, son or daughter with a serious health condition. The FMLA requires employers to reinstate employees to the same or an equivalent position upon return from leave and to maintain group health coverage during the leave period.

The National Defense Authorization Act for 2008 (NDAA) amended the FMLA to provide leave to eligible employees of covered employers to care for covered service members and for any qualifying exigency arising out of the fact that a covered family member is on active duty or has been notified of an impending call to active duty status.

### ***Proposed Revisions to the FMLA Regulations***

In the NPRM, the DOL proposes restructuring and reorganizing several sections of the regulations and rewording the titles of the regulatory provisions so that they are statements rather than questions.

The DOL also proposes a number of substantive revisions, including amending language in the regulations to clarify that employees may independently settle FMLA claims without the approval of the DOL or a court, in response to the Fourth Circuit's decision in *Taylor v. Progress Energy*.

The DOL also proposes eliminating language in the regulations stating that an employee who does not receive proper notice of his or her FMLA rights will be deemed to be eligible for FMLA leave. The DOL states that it believes this provision is invalid in light of the U.S. Supreme Court decision in *Ragsdale v.*

Wolverine World Wide, Inc., 535 U.S. 81 (2002), in which the Court held that any categorical penalty for a violation of notice and designation provisions in the regulations exceeds the Department's statutory authority.

Some of the other proposals include:

- Excluding professional employer organizations from the definition of joint employers (if certain conditions are met);
- Clarifying that time spent on "light duty" does not count against an employee's FMLA leave entitlement;
- With regard to continuing treatment under the definition of serious health condition, providing that treatment "two or more times" by a health care provider must occur within 30 days of the beginning of the period of incapacity unless extenuating circumstances exist;
- With regard to treatment of a chronic serious health condition, providing that "periodic visits" to a health care provider be defined as at least two visits to a health care provider per year;
- Adding physicians' assistants to the list of recognized health care providers and eliminating the requirement that PAs operate without supervision by a doctor or health care provider;
- Elimination of language in the regulations distinguishing between attendance bonuses and production bonuses – so that an employer can disqualify an employee from receiving, for example, a perfect attendance bonus if the employee has been absent, even if the absence was covered by the FMLA;
- Providing 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, including, for example, paid vacation, personal leave, family leave, "paid time off" (PTO), or sick leave;
- Clarifying that for FMLA purposes "substitution" means that the unpaid FMLA leave and the paid leave provided by an employer run concurrently;
- Amending the medical certification process to allow direct contact between the employer and employee's health care provider for purposes of clarification of the certification form, as long as the HIPAA privacy rule requirements are met;
- Amending the medical certification form to permit a health care provider to provide a "diagnosis";

- Clarifying the requirements for recertification;
- Collecting all notice provisions into one comprehensive section addressing an employer's notice obligations and extending the time for employers to send out eligibility and designation notices from two business days to five business days;
- Requiring employees to follow the employer's usual and customary call-in procedures for reporting an absence, except in unusual circumstances.

For a detailed discussion of the proposed revisions, please click [here](#). Employers should be aware that the DOL's proposals are not final revisions and they should continue to follow the current regulations until the DOL issues final revised regulations.

### ***Request for Comments on Family Military Leave Regulations***

The DOL has identified a number of issues with regard to the family military leave statutory provisions and has issued a series of questions seeking comment on subjects and issues that may be considered in the final regulations. The DOL anticipates that its next step, after reviewing comments received in response to this NPR, will be issuance of final regulations interpreting the NDAA amendments. For a detailed discussion of the request for comments on the military family leave provisions, please click [here](#).

The DOL has also published a notice on its website that may be used by employers to provide notice of the family military leave amendments, which is available at: <http://www.dol.gov/esa/whd/fmla/NDAAAmndmnts.pdf>.

### ***Employer Comments***

Employers who are interested in submitting comments to the DOL on either the proposed revisions to the FMLA regulations or the family military leave regulations may do so by either one of the following methods:

- Electronic comments, through the Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Mail: Address all written submissions to Richard M. Brennan, Senior Regulatory Officer, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, N.W., Washington, DC 20210.

Comments should be identified by RIN 1215-AB35 and must be received by the DOL by April 11, 2008.

If you have any questions about the proposed regulations or the FMLA in general, please contact the Ford & Harrison attorney with whom you usually work.