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Spencer Fane Britt & Browne LLP HR Choice News Flash

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LABOR & EMPLOYMENT PRACTICE

Your Chance to Help Fix the FMLA!

Since the FMLA's passage in 1993, employers and HR Professionals alike have struggled with the its Byzantine regulations, and at times with opportunistic employees who use the Act as a shield for haphazard attendance. In December, the Department of Labor's Wage and Hour Division announced that it is preparing to revise the regulations interpreting and implementing the Act. The goals of the revision are to make the regulations more consistent with the Act's statutory requirements, to make the regulations easier to understand and apply, and to prevent abuses where possible.

The current comment period represents an unusual opportunity for employers to directly influence improvements in a law that has been difficult for employers to administer, and that has been ripe for abuse. We believe this will be the most important chance to do so. Unions, advocacy groups, and plaintiffs' lawyers are actively campaigning against many potential revisions, and they are certain to submit a large number of comments in support of their positions. Employers and HR professionals can help build a case for reform by submitting comments that describe the difficulties they have encountered in administering the Act, giving special attention to the ways in which the current regulations allow for abuse, reduce productivity, or create unnecessary costs for businesses.

Employers and others interested in the revisions are invited to submit comments to the Department of Labor, describing problems they have encountered in administering the FMLA, and offering suggestions for improvements. Comments should be submitted to Senior Regulatory Officer Richard M. Brennan, Wage and Hour Division, U.S. Department of Labor via email to whdcomments@dol.gov. or via facsimile at (202) 693-1432. All comments must be received by 4 p.m. CST on Friday, February 2, 2007. DOL will use the comments and suggestions to assist it in redesigning and revising the existing FMLA regulations.

The most useful comments are those that describe specific situations that result in hardship or problems for a business. Comments describing problems can be

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helpful even if they do not include a specific proposal for revision or improvement. Of course, comments should not identify employees by name.

We encourage you to prepare and submit comments that describe problems with whatever aspects of the Act you have found most difficult. DOL cannot change any of the basic statutory requirements behind the Act, but many of the most significant hardships created by the Act arise from the regulations. As food for thought, consider the following:

- Medical leave under the Act was intended to cover only “serious health conditions.” Does the definition of “serious health condition” need to be changed to make it clear that minor illnesses of limited duration are not covered? Should “chronic” conditions be better defined or covered at all? What problems do “chronic” conditions pose? Should the definition of “period of incapacity” be measured in terms of “days of absence” rather than by “duration of the condition?” (The regulations currently require that the *condition itself* last more than three consecutive *calendar* days.) Is three days an adequately long period of time to measure a “period of incapacity?” Would five days or longer be more consistent with employers’ paid sick day policies or the length of waiting periods under short-term disability plans?
- The statute requires employees to provide medical certification when they wish to take medical leave for their own serious health condition, or to care for a family member with a serious health condition. Would allowing employers to contact health care providers directly for clarification and additional information streamline the process? Should the leave certification form itself serve as employee consent for the employer to contact the health care provider directly? Should the medical certification form be changed? Should there be more than one version of it? Should doctors be required to reply with more than a simple “unknown” about

the frequency and duration of unscheduled, intermittent absences for chronic conditions? Should employees be required to produce a doctor’s note for every intermittent absence?

- The statute allows employees to take leave on an intermittent basis where medically necessary. Should employees be permitted to take intermittent leave and miss up to 60 days per year due to a chronic condition for the rest of their work lives with impunity? Should employees be able to claim that tardiness falls under FMLA every time they are late for work because of a chronic condition such as migraines? Should employers be allowed to track FMLA leave in full hour, half-day, or some other increment instead of by the minute or second?

A copy of the DOL’s Request for Information on the FMLA can be found at a special website set up by DOL at <http://www.dol.gov/esa/whd/fmla-comments.htm>. If you have any questions about the upcoming revisions to the FMLA, or would like assistance in preparing any comments for the Department of Labor, please contact Sue Willman at 816-292-8162, or you may email Sue at swillman@spencerfane.com.

Jeffrey M. Place



Jeff practices labor and employment law exclusively on behalf of management, with an emphasis on traditional labor relations and employment litigation. Jeff handles collective bargaining negotiations, arbitrations, counter-union campaigns, and matters before the National Labor Relations Board and other federal and state agencies, in addition to litigating state and federal employment discrimination and wrongful discharge cases for companies of all sizes. He has successfully tried a number of jury cases and handled both labor and employment work throughout the United States. Jeff received his law degree, *magna cum laude*, from Harvard Law School. He received his bachelor’s degree, *summa cum laude* with an English major and Spanish minor, from the University of Utah. Jeff has spent significant time abroad and is fluent in Spanish.