

## Legal Updates & News

### Bulletins

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#### DOL Proposes Revisions to the FMLA Regulations

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by [Erika Drous](#)

Employment Law Commentary, March 2008

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On February 11, 2008, the U.S. Department of Labor (“DOL”) published proposed revisions to the Family Medical Leave Act (“FMLA”) regulations. This is the first time changes have been proposed to the regulations since the law’s enactment in 1993. 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 the need to care for a spouse, parent, son, or daughter with a serious health condition. Earlier this year, President Bush signed into law the fiscal year 2009 Defense Authorization Act (“the Act”), which expanded the FMLA to provide leave for 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. (See our February 2008 Employment Law Commentary.)

The proposed regulations suggest reorganizing 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, a proposal made in response to conflicting circuit court decisions regarding the enforceability of FMLA waivers.<sup>[1]</sup> It remains to be seen whether courts will defer to the DOL on this issue if the proposed regulations are finalized.

Significant changes were proposed regarding employer notice requirements. The proposed regulations have expanded the employer’s general notice obligations. In addition to the general posting requirements, employers must distribute to each employee, at least annually, the same notice that is posted. The DOL included a prototype notice as Appendix C to the proposed regulations. The regulations also propose an “eligibility notice” that would require employers to notify an employee of their FMLA eligibility within five business days (as opposed to three business days under the current rule). The DOL has proposed a third “designation notice” that would require employers to notify employees with specific written notice that leave is being designated as FMLA leave within five days of receiving sufficient information to determine whether the employee’s absence is protected by the FMLA. The employer must inform employees of the specific amount of hours, days, or weeks that will be counted as FMLA leave, and also must notify the employee if some period of leave taken is not designated as FMLA leave. The DOL also recognizes that employers can retroactively designate FMLA leave in light of the U.S. Supreme Court decision in *Ragsdale v. Wolverine World Wide Inc.*, 535 U.S. 81 (2002). In *Ragsdale*, the Court held that any categorical penalty for a violation of notice and designation provisions in the regulations exceeds the Department’s statutory authority.

The DOL did provide some clarification for employers dealing with an employee who seeks leave for serious health condition requiring “continuing treatment” by a health care provider. Currently, for leave of more than three consecutive calendar days plus two treatments, an employee is not required to make the two required visits to the health-care provider within any specified time period. The proposed regulations would require that treatment “two or more times” must occur within 30 days of the beginning of the period of incapacity, unless extenuating circumstances exist. For chronic conditions, current regulations require “periodic visits” for treatment. The proposed regulations would require that “periodic visits” occur at least two or more times within a 12-month period.

The proposed regulations give employers five business days to request a medical certification of the need for leave. If the medical certification is deemed to be incomplete or vague, employers must describe the deficiencies in writing and give the employee seven days to cure the deficiency, unless not practicable despite the employee's "diligent good faith efforts." The DOL proposes changes to the medical certification form to request more specific information, such as the job functions that the employee cannot perform and the anticipated frequency and duration of chronic conditions. The new regulations would also amend the medical certification form to permit a health-care provider to provide a "diagnosis."

The proposed regulations would allow an employer to contact the employee's health-care provider directly (as opposed to through the employer's chosen health-care provider) for purposes of clarifying and authenticating the medical certification, as long as the HIPAA privacy rule requirements are met. Employers would not need an employee's consent to contact a health-care provider for purposes of authenticating a medical certification form. Consent would still be required to clarify the content of the medical certification.

Although it acknowledged that no issue received more substantive commentary than employee use of intermittent leave, the DOL offered little clarification in this area. The DOL has proposed language that permits employers to require fitness for duty certification every 30 days if an employee has used intermittent leave during that period and a reasonable safety concern exists. The DOL has also clarified that employees must make a "reasonable effort" (as opposed to an "attempt") to schedule leave so that it does not unduly disrupt an employer's operation. The proposed regulations note that intermittent or reduced-schedule leave to care for a family member includes both situations where the family member's condition is intermittent and "where the employee is only needed intermittently—such as where other care is normally available or care responsibilities are shared."

Other noteworthy proposed changes are:

- The DOL proposes that employers count an employee's prior service with the company toward the 12 months needed for FMLA eligibility if the break in service does not exceed 5 years;
- The proposed language clarifies who is considered a "Joint Employer";
- The proposed regulations clarify that time spent on "light duty" does not count against an employee's FMLA entitlement;
- The proposed language adds physicians' assistants ("PAs") to the list of recognized health-care providers and eliminates the requirement that PAs operate without supervision by a doctor or health-care provider;
- The proposed language eliminates confusing language in the regulations distinguishing between attendance bonuses and production bonuses; under the proposed regulations, bonuses "based on the achievement of a specified goal such as hours worked, products sold or perfect attendance" can be denied if the employee has not met the required goal;
- The proposed language clarifies that pregnant employees and their spouses may take FMLA leave to attend prenatal appointments without regard to their ability to work;
- The DOL clarified that missed overtime can be counted against the 12-week entitlement if the employee would have otherwise been required to report for duty *but for* taking the FMLA leave;
- The proposed language requires employees to follow the employer's usual and customary call-in procedures for reporting an absence, except in unusual circumstances;
- The proposed regulations note that calling in "sick" without providing more information does not constitute sufficient employee notice under the FMLA;
- The proposed regulations note that employees have an obligation to respond to an employer's questions to determine whether leave is potentially FMLA qualifying; failure to respond may result in denial of FMLA protection;
- For fitness for duty certifications, the proposed regulations would allow an employer to require that the employee's health-care provider certify that the employee is able to perform a list of essential job functions, as opposed to the current language that requires only a "simple statement" that the employee is able to return to work.

The DOL has invited employer comments on the proposed regulations. The proposed regulations can be located at:

<http://www.dol.gov/esa/whd/fmla/FedRegNPRM.pdf>.

Employers have until April 11, 2008 to submit any comments.

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#### Footnotes:

[1] In *Taylor v. Progress Energy*, 415 F.3d 364 (4th Cir. 2005), the Fourth Circuit held that unapproved waivers of claims under the FMLA are unenforceable, relying on Section 825.220(d) of the Department of Labor's regulations. This decision conflicted with *Faris v. WilliamsWPC-I, Inc.*, 332 F.3d 316 (5th Cir. 2003), a Fifth Circuit Court of Appeals decision which held that Section 825.220(d) applies to current employees and prospective claims and not the post-dispute settlement of claims.