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Employment Alert: Department of Labor Amends FMLA and Releases Proposed New FMLA Regulations

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On February 11, the U.S. Department of Labor published a proposal to update its regulations under the Family and Medical Leave Act (FMLA). The proposed regulations are aimed at providing clarity for both workers and employers about the practical application of the 15 year-old law. The DOL developed the proposed regulations in response to court decisions invalidating portions of the existing regulations, discussions with various stakeholders, and over 15,000 comments received in response to a DOL-issued Request for Information.

The regulations are also designed to facilitate the implementation of legislation recently passed by Congress (the National Defense Authorization Act for FY 2008), which amended the FMLA by providing two new leave entitlements for military service people and their families. Under the legislation, family members of injured military service men and women will be able to take up to 26 workweeks of leave to care for those wounded, and will be able to use FMLA leave because of any qualifying exigency arising out of the fact that a covered family member is on active duty or called to active duty status. DOL is seeking public comment on a wide variety of issues related to these new "caregiver" and "active duty" military leave provisions before it issues the final rule on this new law.

Changes of Particular Significance to Employers

Definition of "Serious Health Condition": In response to criticism and ambiguity over the scope of "serious health condition," the proposed rule modifies the definition for "continuing treatment"—which currently entails a period of incapacity of more than three consecutive days and two or more treatments—to require that the two treatment visits must occur within 30 days of the period of incapacity. For chronic serious health conditions, the rule would clarify "periodic visits" as requiring employees to see a physician at least two times per year for that condition.

The Medical Certification Process: The proposed regulations include several changes to the medical certification process, which would allow employers to more easily obtain information from healthcare providers. For example, under the proposed rule, employers would be able to directly contact employees' healthcare providers for purposes of clarification of medical certifications, without the employees' consent, as long as HIPAA requirements are met. Healthcare providers would also be able to provide a diagnosis of the patient's health condition as a part of the certification. The rule also clarifies that employers may request a new medical certification each leave year for medical conditions that last longer than one year, and request recertification of an ongoing condition at least every six months.

Employer Notice Requirements: Employers' notice requirements would be consolidated, requiring employers to provide annual notice of FMLA rights and responsibilities to employees, and to give employees written notice of, and a corresponding seven day period to cure deficiencies in, medical certifications. Employers also would now have five days, rather than two, to send out eligibility and designation notices.

Employee Notice Requirements: Under the proposed changes, in most cases employees would be required to follow their employers' standard call-in procedures for reporting an absence. Currently, the regulations have been interpreted to allow employees to notify their employers up to two full business days after an absence that they want it to be designated as FMLA leave.

Intermittent Leave: The proposed regulations would require employees using unscheduled intermittent leave to comply with their employers' standard call-in procedures for intermittent leave (except in defined "emergency" cases). This change is a departure from the current rule, which allows employees to take the leave and then designate it as FMLA leave as long as two days thereafter. Significantly, the proposed rule does not otherwise modify intermittent leave. Currently, employees may take intermittent leave in small increments, to the extent the employers' payroll systems permit. Employers were hoping that the proposed rule modify—by increasing—the time increments in which intermittent leave can be taken.

The proposed rules make changes in many other areas, including: (1) clarifying that "light duty" assignments do not count against employees' FMLA entitlement and changing the rules so that "light duty" assignments will not affect reinstatement rights; (2) removing categorical penalty provisions that imposed liability on employers for failing to follow FMLA notification rules, and requiring employees to show that they suffered actual harm before holding an employer liable; (3) changing the requirements for substitution of paid leave to allow employees to substitute *any* accrued paid leave (including vacation and personal leave) offered by their employers concurrently with FMLA leave, consistent with the current regulations for the substitution of paid sick leave; (4) allowing employers to disqualify employees from "perfect attendance awards" who are absent due to FMLA leave; (5) making two changes to the certification for "fitness-for-duty," allowing employers to require that the certification address employees ability' to perform the essential functions of their jobs and, where there are reasonable job safety concerns, to allow employers to require "fitness-for-duty" certifications before employees can return to work from intermittent leave; and (6) clarifying joint employer definitions relevant to professional employer organizations (PEO), so that a PEO would not be a joint employer with its client if the PEO does not control or supervise the client's employees and does not benefit from the work performed by the client's employees.

Where Do the Proposed Regulations Leave Employers?

This alert provides a brief overview of the proposed changes to the FMLA regulations—all employers should familiarize themselves with these potential changes on a more comprehensive level and seek guidance on how the changes could impact their particular organizations.

These proposed changes would not take effect until after the 60-day public comment period concludes, on April 11, 2008. Employers who wish to prepare and submit comments must do so before April 11.

At some point after April 11, likely before President Bush leaves office, the DOL will issue its final rule. In the meantime, employers will be well served to revisit their FMLA policies and practices and consider how they may need to be updated if these proposed regulations are finalized.

The full text of DOL's proposed rule can be found at: http://a257.g
.akamaitech.net/7/257/2422/01jan20081800/edocket.access.gpo.gov/
2008/pdf/E8-2062.pdf

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For additional information, or for help preparing and submitting comments, please contact the Mintz Levin lawyer with whom you usually work or one of the employment attorneys listed below.

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