

# PROPOSED CHANGES TO HOW EMPLOYERS ADMINISTER REQUESTS FOR FAMILY AND MEDICAL LEAVE



On February 11, 2008, the Department of Labor (DOL) issued proposed changes to the Family and Medical Leave Act. Although the regulations were anticipated to clarify certain provisions and alleviate administrative burdens on employers, it is questionable as to whether the proposed regulations achieve those goals.

The following summary highlights some of the 2008 proposed changes to the FMLA. The DOL is accepting comments and questions regarding the proposed changes through April 11, 2008.

## **Employee Eligibility**

Under the both the old regulations and the new proposed regulations, an employee must work for an employer for at least 12 months and at least 1,250 hours in those 12 months to be eligible under the FMLA. The proposed regulations address the impact of a break in service. A service break of less than five years does not impact employee FMLA eligibility. If the service break is more than five years but due to military leave or some other authorized leave, it may not impact FMLA eligibility.

## **Notice**

An employer's requirement to post a notice providing general information regarding FMLA can now be satisfied if the information is electronically posted if (1) the posting is accessible to applicants, as well as employees, and (2) all other general notice requirements are satisfied. The general notice must be distributed to each employee at least annually, and may be done so electronically.

The new regulations codify the Supreme Court's decision in *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002), which provides a remedy to employees for notice violations. If employees are able to demonstrate harm as a result of a notice failure by employer regarding eligibility or FMLA designation, employer may be held liable for damages or equitable relief, including lost wages/benefits, other monetary losses, re-employment, reinstatement, or promotion. Moreover, an employer may retroactively designate leave as FMLA leave as long as the designation does not cause the employee harm or injury.

The new regulations require that the employee provide more specifics to the employer to trigger its responsibility. The new regulations explicitly state that an employee cannot merely call in "sick". If an employee fails to respond to her employer's questions regarding the medical condition, such failure or non-cooperation may result in a denial of FMLA leave.

## **Serious Health Condition**

Under the new regulations, common ailments may qualify as "serious health conditions" under the FMLA if they otherwise meet the definition. The 1995 regulations suggested that common ailments, such as the common cold, flu, minor ulcer, or headaches, would normally not qualify a serious health condition.

## **Medical Certification & Physician Contact**

The regulations include clarifications as to what facts constitute the existence of a serious health condition including information about symptoms, hospitalization, doctor's visits, prescription medication, referrals for evaluation or treatment, such as physical therapy, or any other regimen of continuing treatment. Generally, an employer may not directly contact an employee's physician. An employer may now directly contact the employee's physician in two limited circumstances. First, the employer may directly contact the physician "[i]f an employee's serious health condition may also be a disability within the meaning of the Americans with Disabilities Act," as long as the more liberal ADA restrictions are followed. Second, an employer may seek clarification and authentication of medical certifications directly through the employee's physician. An employer no longer is required to hire its own physician to acquire this type of information.

## **Fitness for Duty Certification**

The basic procedures for the fitness-for-duty certification had not been changed but the substantive requirements have been changed in some circumstances. Whereas before a simple statement that an employee is able to return to work, the new regulations allow an employer to submit a list of essential work duties in the eligibility notice that advises employee of the fitness-for-duty certification requirement. If an employer submits such a list, the health care provider must assess whether an employee is able to resume those essential job functions.

## **Employee's Waiver of Employee's Rights under the FMLA**

The new regulations clarify the general prohibition of an employee's waiver of FMLA

rights. An employer must not induce an employee to prospectively waive FMLA rights. However, employees may waive their rights after the fact without court or DOL approval. Also, employees may waive any hypothetical FMLA violations in settlement agreements without special oversight. Thus, an employee could effectively release any potential FMLA claims she would have against the employer.

## **Employer's Procedures for Applying for FMLA**

Under the new regulations, the employer may require employees to follow established call-in procedures (to the extent that they are not more stringent than FMLA timing requirements). An employee's failure to follow such procedures may result in the denial or delay of FMLA benefits. Under old regulations, no such denial or delay was available for non-compliance with procedures.

## **Other Provisions**

### *Missed Overtime*

The new regulations make clear that if an employee is unable to work scheduled overtime due to his serious medical condition, the overtime not worked is counted against his FMLA leave.

### *Adoption*

FMLA leave now includes time to "travel to another country to complete an adoption." The new regulations make clear that the FMLA protections are not affected by the "source of the adopted child."

### *Light Duty*

Whereas the old regulations counted "light duty" as part of the FMLA leave, the new regulations have deleted that provision. Therefore, an employee that accepts light duty does not need to exhaust his FMLA leave while on light duty.



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