

## Department of Labor to Publish Proposed Regulations Under the Family Medical Leave Act

February 11, 2008

The U.S. Department of Labor (DOL) will publish today in the Federal Register its proposed regulations under the Family and Medical Leave Act (FMLA). The proposals represent the first major regulatory update since the law's enactment 15 years ago, and endeavor to provide much-needed clarification to long-debated issues in administering family leave.

We are in the process of reviewing and analyzing the DOL's comprehensive 477-page proposal, and are preparing a detailed analysis for distribution shortly. In the meantime, we offer this summary of the proposed regulations:

- **Changes to Medical Certification Requirements.** The DOL is proposing a number of changes to the medical certification procedures. For example, the DOL proposes that employers be allowed to contact medical providers directly to obtain clarification or authentication of documentation. Under the current rule, such communications may take place only between a health care provider retained by the employer and the employee's health care provider. The DOL also proposes that, in the case of an incomplete or insufficient certification, the employer must state in writing what additional information is necessary and provide the employee with seven calendar days to cure the deficiency. Under this proposal, additional time would be allowed where the employee notifies the employer within the seven-calendar-day period that he or she is unable to obtain the additional information despite diligent, good-faith efforts. The current regulations provide only that an employer give "reasonable opportunity" to cure defects.
- **Changes to Intermittent Leave Requirements.** Although the proposal noticeably lacks any major overhaul of FMLA intermittent leave requirements – arguably the most burdensome requirements on employers – the proposed regulations do require employees to follow the workplace call-in procedures if they want to take unscheduled, intermittent leave. Under the current rule, employees need only designate an absence as FMLA-qualifying leave within *two days* of the absence.
- **Clarification of "Serious Health Condition."** The DOL continues to express frustration about the definition of a "serious health condition," and as a result, there are no significant changes to the definition that would prevent coverage for seemingly minor illnesses. The DOL proposes instead modest clarifications to existing regulations including, for example, a clarification of the time period within which an employee must have two visits with a medical provider when there have been three consecutive days of incapacity. While some courts have required employees to

complete two visits within the three days of incapacity, the DOL's proposed clarification requires instead that those two visits be completed within 30 days of incapacity. Also, because the current regulations define a chronic serious health condition as one that requires "periodic visits for treatment," but fails to define "periodic," the DOL also proposes to clarify that "periodic" means visiting a physician two or more times per year for the same condition.

- **Waiver and Release.** The DOL makes clear in one proposal that it disagrees with the United States Court of Appeals' decision in *Taylor v. Progress Energy*, 493 F.3d 454 (4th Cir. 2007), which held that employees cannot voluntarily settle their past FMLA claims. The proposed regulations state, in response to *Taylor*, that employees and employers should be permitted to voluntarily agree to the settlement of past claims without having to first obtain the permission or approval of the DOL or a court.
- **Substitution of Paid Leave Clarification.** In response to concerns that the current regulations force employers to treat employees seeking to use accrued paid leave concurrently with FMLA leave more favorably than those who use their accrued paid leave for other reasons, the DOL's proposal includes language requiring that the employee follow the terms and conditions of an employer's paid leave policies when such leave is substituted for FMLA leave. This would apply to any form of accrued paid leave – including, for example, paid vacation, personal leave, family leave, "paid time off" (PTO), or sick leave.
- **Ragsdale Issues Addressed.** The United States Supreme Court in *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002) invalidated the penalty provision in 29 C.F.R. 825.700(a), which states: "[I]f an employee takes . . . leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement." The Court noted that in such circumstances, an employee could receive more than 12 weeks of leave, which is well beyond the statutory leave requirement. Accordingly, the DOL proposes to modify a number of penalty provisions to incorporate a monetary liability (as opposed to extended leave) where the employee is able to demonstrate individualized harm as a result of the employer's failure to provide notice of eligibility or designation of FMLA leave as required.
- **New Military Leave Provisions Addressed.** The DOL also seeks comment on new military family leave provisions that were enacted last month. While the DOL stops short of proposing regulations to effectuate the new law, the proposal includes a description of the relevant military family leave statutory provisions, a discussion of issues that the DOL has identified, and a series of questions seeking comment on subjects and issues that may be considered in the final regulations.

The proposed regulations are open for public comment for 60 days, and the DOL is expected to issue final regulations before the end of the current administration. The Morgan Lewis Labor & Employment Law Practice Group is prepared to assist you in your analysis of the proposed changes and their impact on your employment policies, and to work with you in submitting comments to the DOL. We are also considering forming a coalition of client companies for the purpose of pooling resources to provide comments on these proposed regulations.

If you are interested in a more detailed analysis of the proposed regulations, submitting comments, or possibly joining a coalition, please contact one of the members of our FMLA Team:

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