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## Proposed FMLA Regulations: What Employers Should Know

presented by:

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# What New Proposal?

- On January 28, 2008, President Bush signed the National Defense Authorization Act for Fiscal Year 2008.
  - Law amends the Family and Medical Leave Act of 1993 (FMLA) to provide broader leave protections related to a family member's military deployment, illness or incapacity.
  - New provisions *do not* deal with problematic issues under existing law.
- But that gap didn't take long to fill...
  - On February 11, 2008, Department of Labor (DOL) proposed new regulations on existing problems and some interim guidance on new provisions.
  - Comments due on April 11, 2008, and final rule-making is expected by the end of the Bush Administration.

# Proposed Regulations: Getting Some Perspective on Complex Issues

- Proposed regulations make many changes – albeit modest ones – to the existing regulatory landscape.
- Proposal stops short of the major overhaul that many expected.
- Don't get too comfortable...
  - Democratic Administration may mean a paid-leave mandate over the next four years.
  - “Employer-friendly” technical changes proposed are more critical than ever to employers.

# FMLA Refresher

- FMLA provides 12 workweeks of unpaid leave during any 12-month period for one or more of the following reasons:
  - The birth and care of the newborn child of the employee;
  - The placement with the employee of a son or daughter for adoption or foster care;
  - The care of an immediate family member (spouse, child, or parent) with a serious health condition; or
  - Medical leave when the employee is unable to work because of a serious health condition.

# FMLA Refresher

- To be eligible for leave, employees must be employed for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave.
- Substitution of paid leave allowed in certain circumstances.
- Regulations include detailed notice and certification requirements.

# Proposed Regulations: Definition of Serious Health Condition

- The definition of “serious health condition” would continue to cover seemingly minor illnesses, like colds and stomachaches.
- DOL proposes two modest clarifications to existing regulations:
  - Two visits with a medical provider would need to be completed within 30 days of incapacity; and
  - “Periodic” would mean visiting a healthcare provider at least two times per year for the same condition.

# Proposed Regulations: Use of Intermittent Leave

- “No issue received more substantive commentary.”
- DOL *does not propose* to increase the minimum increment of intermittent leave.
- DOL does propose one helpful clarification:
  - If the employee would be required to work overtime hours, then the hours the employee would have been required to work (but did not) may be counted against the employee’s FMLA entitlement.

# Proposed Regulations: Employer's Paid Leave Policy

- Proposal would permit employers to enforce the terms and conditions of their paid leave policies when an employee elects to substitute paid leave for unpaid FMLA leave.
  - Employer could enforce such terms and conditions regardless of the type of leave to be substituted.
- To avail themselves of this provision, however, employers would be required to:
  - Make employees aware of any restrictions associated with using paid leave *in writing*; and
  - Inform the employee that he or she remains entitled to unpaid FMLA leave.

# Proposed Regulations: Interplay of Paid Leave with Disability Benefits

- Currently, substitution provisions under the FMLA are “inapplicable” if an employee is receiving benefits under a disability plan.
- Under proposal, employer and employee *would be permitted to agree to have paid leave also run concurrently* with FMLA leave to *supplement* disability benefits.
  - E.g., employer and employee may agree to such an arrangement when an employee only receives two-thirds of his or her salary from a disability plan.

# Proposed Regulations: Length of Service Requirement

- Under current regulations, the 12-month “length of service” requirement need not be consecutive.
  - No clarification on how far back to count.
  - *Rucker v. Lee Holding*, 471 F.3d 6 (1st Cir. 2006).
- Proposed rule establishes that employers need not count breaks in service of five years or more, except any break in service (of any length), resulting from either:
  - The employee’s fulfillment of military obligations; or
  - A period of approved absence or unpaid leave for, by way of example, education or childrearing, where a written agreement or collective bargaining agreement exists reflecting the intent to rehire the employee.
- Proposal puts the burden on employee, *not* employer, to establish that he or she is an eligible employee where an employee claims eligibility based on prior service that predates the employer’s records.

# Proposed Regulations: Coverage to Care for a Family Member

- Three proposed clarifications:
  - Determination of whether an adult child has a disability should be made at the time leave is to commence.
  - Signed tax return would be considered reasonable documentation to establish *in loco parentis* relationship.
  - Employee does not need to be the only family member who can provide care for the family member.

# Proposed Regulations: Retroactive Designations

- In *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002), the Supreme Court invalidated the penalty provision in 29 C.F.R. § 825.700(a).
  - “If 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.”
  - Since *Ragsdale*, courts take an individualized look at whether the employee was harmed as a result of the employer’s failure to timely designate leave.
- DOL proposal would allow employers to retroactively designate leave, provided that there is no individualized harm established by the employee.
- If there is a violation, DOL proposes to impose monetary relief (mirroring the relief provided by the statute as opposed to simply providing extended leave) on employers that fail to timely designate leave.

# Proposed Regulations: Employer Notice Requirements

- Under proposal, “posting” notice requirement could be satisfied through *electronic means*, provided that:
  - Electronic posting is in a conspicuous place on the employer’s website.
  - It is accessible to all applicants and current employees (not just on an internal intranet site).
  - All employees have access to company computers that post the information in a conspicuous manner.

# Proposed Regulations: General Notice

- Employers who do not maintain a handbook would be required to distribute a copy of the general notice to each employee at least once per year, either in paper or electronic form.
- It would no longer be sufficient to distribute general notice in connection with an FMLA leave request.

# Proposed Regulations: Eligibility Notice

- A new, proposed eligibility notice would combine different provisions of the existing regulations, with some modifications on the content and timing of the notice.
- Employers would be required to:
  - Provide notice within five business days from when the employee requests FMLA leave;
  - Notify the employee whether the employee has met the eligibility requirements for leave, and whether the employee still has any portion of his or her FMLA leave entitlement remaining in the applicable 12-month period. If the employee is not eligible or has already used his or her full leave entitlement, the employer must indicate the reasons why the employee is not eligible or has no FMLA leave remaining;
  - Notify the employee of his or her right to take unpaid leave if the employee does not meet the terms and conditions of the employer's paid leave policies to substitute paid leave; and
  - Include a statement of the employee's essential job functions if the employer will require that those functions be addressed in a fitness-for-duty certification.

# Proposed Regulations: Designation Notice

- Proposed regulations would:
  - Increase the time for an employer to provide the designation notice from two days to five days;
  - Require employers to inform the employee, if ascertainable, of the number of hours, days or weeks that will be designated as FMLA leave; and
  - Require employers to notify the employee if the leave taken is not designated as FMLA leave due to insufficient information or was taken for a non-FMLA-qualifying reason.

# Proposed Regulations: Enforcement of Employer Call-In Procedures

- Under the current regulations, an employee must provide notice “as soon as practicable.”
  - DOL has interpreted this language to mean that an employer can wait up to two business days to report the FMLA absence from the time the employee becomes aware of the need for such leave.
  - DOL has taken the position that employers cannot enforce normal call-in procedures in such circumstances.
- DOL proposes to change its position, stating that employees may be required to follow established call-in *procedures* in connection with an FMLA leave request.
  - Employees still would not necessarily need to follow employer’s restrictions *on the timing* of call-ins.
  - Failure to follow such procedures would result in a delay or denial of FMLA protection.

# Proposed Regulations: Clarification of What Constitutes Sufficient Notice

- DOL proposes to clarify the standard as to what constitutes sufficient information from the employee to trigger the employer's obligations to consider FMLA eligibility.
- The employee would need to inform the employer:
  - That the employee is unable to perform the functions of the job (or that a covered family member is unable to participate in regular daily activities);
  - The anticipated duration of the absence; and
  - Whether the employee (or family member) intends to visit a healthcare provider or is receiving continuing treatment.

# Proposed Regulations: Content of Medical Certifications

- DOL proposes a simplified medical certification form that would:
  - Include more specific provisions for healthcare providers to provide medical facts;
  - Ask the healthcare provider to provide information on symptoms, doctor visits, and the medical treatment regimen to better enable employers to make a determination whether the leave qualifies under the FMLA; and
  - Specifically allow doctors to provide a diagnosis, which is not permitted under the current regulations.

# Proposed Regulations: Medical Certifications

- New proposal also would alter the following:
  - Time frame to correct a deficient certification;
  - An employer's ability to contact the employee's healthcare provider as part of clarification process;
  - The frequency that an employer may request recertification; and
  - The type of background information that an employee would need to provide in connection with a second-opinion process.

# Proposed Regulations: Other Important Issues

- Fitness for Duty in Connection with Intermittent Leave
  - An employer may be permitted to require an employee to furnish a fitness-for-duty certificate every 30 days if an employee has used intermittent leave during that period and reasonable safety concerns exist.
- Information to Be Obtained as Part of the Fitness-for-Duty Certification
  - When an employer (1) provides the employee with a list of the employee's essential job duties together with the eligibility notice and (2) advises the employee of the necessity for a fitness-for-duty certification, the employer may require the employee's healthcare provider to certify that the employee can perform the enumerated duties.
- Perfect Attendance Awards
  - Employer may disqualify an employee from a bonus or award predicated on the achievement of a specific goal (i.e., hours worked) where the employee fails to achieve that goal as a result of an FMLA absence.
- Waiver and Release of Claims
  - 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 DOL or a court.

# Family Member Military Leave Amendments: Background

- Two major developments:
  - Expanded leave to care for ill or injured service member.
  - Created new leave for a “qualifying exigency” related to military service.

# Family Member Military Leave Amendments: Leave to care for ill or injured service member

- Son, daughter, spouse, parent, or **next of kin** of a covered service member up to **26 weeks** of unpaid leave **in a single 12-month period** to care for service member.
  - “Next of Kin” – like grandparents, for example – did not typically qualify for FMLA leave.
  - 26 weeks more than doubles existing leave time.
  - Effective immediately!

# Family Member Military Leave Amendments: Exigency Leave

- Allows an employee to take up to 12 workweeks of leave for a “qualifying exigency” arising out of that employee’s spouse, son, daughter, or parent being on active duty or having been notified of an impending call or order to active duty in the Armed Forces in support of a contingency operation.
- Probably addresses situations where an employee’s life is significantly disrupted due to a family member’s deployment, *but...*
  - Does not go into effect until DOL issues regulations defining “exigency.”
  - DOL simply “encouraging” employers to offer some form of emergency leave to eligible employees.

# Military Leave Amendments: Definition of “Next of Kin”

- The new entitlement for an employee to care for an ill or injured service member includes “next of kin.”
  - Statute defines “next of kin” as the “nearest blood relative.”
- Should DOL adopt Department of Defense interpretation?
- Or, should an employee be able to designate “any blood relative” as his or her designated “next of kin” for purposes of FMLA entitlement?

# Military Leave Amendments: Certification for wounded service member leave

- What standard should be used for what constitutes a “serious illness or injury” that *may* “render the member medically unfit to perform the duties of the member’s office, grade, rank, or rating?”
  - Is it appropriate to use existing military medical certification to determine FMLA leave eligibility for this purpose?
- Do standard certification requirements make sense in context of this leave entitlement?

# Military Leave Amendments: Definition of “Son or Daughter”

- Does definition of “son or daughter” need to be changed for purposes of family military leave provisions?
  - Service members are, by law, age 17 or above.
  - This disqualifies most parents or adult sons or daughters from qualifying for leave under the amendments.

# Military Leave Amendments: Calculating Single 12-Month Period

- How should the “single 12-month period” be measured for purposes of determining the 26-week leave entitlement to care for an ill or injured service member?
  - Should it be the same 12-month period, or triggered from when the illness or injury occurred?
  - Does the new statutory entitlement give an eligible employee only one 26-week entitlement per service member, per injury, or per employer?

# Military Leave Amendments: Definition of “Exigency”

- How should the DOL define qualifying “exigencies” for purposes of the family military leave provisions?
  - Must there be some nexus between the eligible employee’s need for leave and the service member’s active duty status?
  - Should leave be limited to nonmedical-related exigencies?

# Military Leave Amendments: Definition of “Exigency”

- DOL seeks specific input about whether the following circumstances are sufficiently “exigent” for purposes of leave:
  - Making arrangements for child care;
  - Making financial and legal arrangements to address the service member’s absence;
  - Attending counseling related to the active duty of the service member;
  - Attending official ceremonies or programs where the participation of the family member is requested by the military;
  - Attending to farewell or arrival arrangements for a service member; or
  - Attending to affairs caused by the “missing” status or death of a service member.

# New Federal Regulations and Amendments: Interaction with Existing State Law

- Eleven states and the District of Columbia have “FMLA-like” state statutes.
  - States include California, Connecticut, Hawaii, Maine, Minnesota, New Jersey, Oregon, Rhode Island, Vermont, Washington, and Wisconsin.
- Employer must comply with both federal and state laws and regulations.
  - For example, a state statute may use an identical term like “serious health condition,” but the state law, regulation or agency may define that term somewhat differently.
- In addition, states may have other statutes that affect an employee’s right to leave for particular reasons such as pregnancy, attendance at school activities, victim of crime and worker’s compensation.

# New Federal Regulations and Amendments: Interaction with Existing State Law

- Because of the number of California employers in attendance on this call, we want to briefly note some California-specific issues:
  - Pregnancy Disability Leave (PDL) eligibility is broader than the FMLA (5 employees and no waiting period).
  - PDL runs concurrently with federal FMLA, but not with California Family Rights Act (CFRA).
    - A pregnant employee in California may be eligible for 7 months of job-protected leave (*i.e.*, 4 months under the PDL and 12 weeks under the CFRA).
  - Employer cannot force a woman to use vacation/PTO while on PDL.
  - Employers are required to inform employees of their rights to PDL, CFRA and state benefits such as State Disability Insurance (SDI) and Paid Family Leave Benefits (PFL).

# New Federal Regulations and Amendments: Interaction with Existing State Law

- California enacted Military Spouse Leave effective October 9, 2007, requiring employers to provide up to 10 days of unpaid leave to employees while military spouse is on leave from deployment.
- A number of other states have adopted similar laws:
  - *New York*: Requires employers with 20 or more employees to provide the spouse of a person on active duty in a combat theater or zone of operations up to 10 days of unpaid leave.
  - *Illinois*: Requires employers with 15 to 50 employees to provide up to 15 days of unpaid family military leave to the spouse or parent of a soldier called to military service lasting longer than 30 days. Employers with more than 50 employees must provide up to 30 days of unpaid leave.
  - Don't forget Indiana, Maine, Minnesota, and Nebraska.

# Reminder: Comments Are Due to DOL on April 11

- For further information or assistance in submitting comments, please contact
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# Questions



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