



Family and Medical Leave Act New Regulations Summary

March 2008

On February 11, 2008, the U.S. Department of Labor (DOL) published a Notice of Proposed Rulemaking to update regulations under the 15-year-old Family and Medical Leave Act (FMLA). Overall, the proposed regulations have been restructured and reorganized for ease of use. Where the existing regulations are structured as a series of questions, the proposed regulations would be in the more common format of a descriptive title. Additionally, all of the notice requirements have been consolidated in one section. Guidance on other subjects, such as leave for pregnancy and birth of a child, leave for treatment of substance abuse, and leave for adoption or foster care has also been consolidated into “one-stop” sections.

The substantive changes to the regulations reflect the DOL’s experience administering the FMLA, discussions with stakeholders, and input received in response to the DOL’s December 2006 Request for Information on the FMLA, published last July. They also reflect the DOL’s response to several Supreme Court cases and lower court decisions interpreting the FMLA and existing regulations. Some of the major changes are summarized below.

Eligible Employees

Generally, an employee is eligible for FMLA leave if the employee has been employed by the employer for twelve months and has logged at least 1,250 hours of service during the twelve months preceding the leave. Under current regulations, it has not been required that the twelve months of employment be consecutive. For example, an employee could work for two years, leave for one year, and then come back to the employer for eight months. As long as all of the other eligibility requirements were satisfied, that employee could qualify for an FMLA leave. The proposed regulations clarify that employment prior to a continuous break in service of five years or more need not be counted. Moreover, where an employee seeking FMLA eligibility relies on a prior period of employment that predates the employer’s records, it is up to the employee to prove prior employment with the employer.

Joint Employers

An employer is only required to give an employee FMLA leave if it employs 50 or more employees within 75 miles of the employee’s worksite. Under the current regulations, employees jointly employed by two employers must be counted by both employers in determining employer coverage and eligibility. Therefore, an employer who employs 25 permanent employees and 25 employees from a leasing or temporary agency employs 50 employees for FMLA purposes. Although job restoration is the responsibility of the primary employer, the secondary employer has some responsibility to accept the returning employee if it still leases employees from the primary employer. The proposed regulations clarify the position of Professional Employment Organizations (PEOs) that contract with client employers merely to perform administrative functions such as payroll, benefits, regulatory paperwork, and updating employment policies. PEOs under the proposed regulations are not joint employers for FMLA purposes, provided that they (1) do not have the right to hire, fire, supervise or determine employee rates of pay, and (2) do not benefit from the work the employees perform.

Light Duty

The proposed regulations clarify that if an employee is voluntarily working at a light duty assignment, the employee is not on FMLA leave and the employee's time spent in the light duty assignment should not count against the employee's 12-week FMLA leave entitlement.

Serious Health Condition

Although the DOL has received many requests for clarification of what conditions constitute a "serious health condition," it declined to make major changes to its current definition, which remains, "an illness, injury, impairment or physical or mental condition that involves inpatient care or continuing treatment by a health care provider." It did, however clarify one of the five alternative definitions of "continuing treatment." Under the current regulations, a condition which involves more than three consecutive calendar days of incapacity plus two visits to a health care provider is one that involves "continuing treatment." The new regulations would clarify that the two visits to a health care provider must occur within 30 days of the period of incapacity, unless extenuating circumstances exist.

Substitution of Paid Leave

While FMLA leave is unpaid, the statute allows employees to take (and employers to require employees to take) accrued paid leave concurrently with their FMLA leave. The current regulations refer to "accrued paid vacation leave, or medical or sick leave." The proposed regulations clarify that "paid time off" (PTO) may be used concurrently with FMLA leave. They also clearly state that the terms and conditions of the employer's paid leave policies apply and must be met for an employee to be able to use paid leave concurrently with FMLA time. For instance, if the employer's leave policy forbids the use of vacation leave in increments of less than a day, the employee would have no right to use less than a day of vacation leave, regardless of whether it was concurrent with an unpaid FMLA leave. To safeguard employees, the DOL also proposes an additional requirement. When an employer provides the Notice of Eligibility for FMLA leave, it also must make the employee aware of any additional requirements and inform the employee that he/she remains entitled to unpaid FMLA leave even if the employee does not meet the conditions for paid leave.

Employer Notice Obligations

As in other parts of the proposed regulations, the employer notice requirements are consolidated into a "one-stop" section. These notice regulations are divided into four topics: general notice, eligibility notice, designation notice and consequences of failing to provide notice.

- **General Notice.** The general requirements for posting of a notice explaining the FMLA's provisions and complaint filing procedures have not changed in the proposed regulations, except to provide circumstances under which the provision may be met by posting electronically.
- **Eligibility Notice.** Current regulations give the employer two days from the time the employee requests leave or the employer acquires the knowledge that the employee's leave may be for an FMLA-qualifying reason to give the employee notice of the employer's intent to designate the leave as FMLA leave. Under the proposed regulations, the employer will now have 5 business days to issue an "eligibility notice," advising whether the employee is eligible for FMLA leave, and how much FMLA leave is available to the employee. If the employee is not eligible, the notice must state the reasons the employee is not eligible. If the employee is eligible, the notice will set forth the employee's responsibilities (i.e., get a medical certification).
- **Designation Notice.** If an employee is given the eligibility notice and instructed to obtain a medical certification the employee would have 15 days to get the certification completed. Under the proposed regulations, once employer has all information, the employer would have 5 days (rather

than the current 2 days) to issue a “designation notice” designating FMLA leave as qualifying. If, however, the employer has enough information at the time the employee first requests the leave, it may under the proposed regulations provide the employee with both eligibility and designation notice simultaneously.

- Consequences of failing to provide notice. The DOL has added a new provision in the proposed regulations that explains that a failure to comply with the notice requirements could result in the interference with the employee’s use of FMLA leave. If the employee is able to prove harm as a result of such interference, the employer may be liable for the employee’s damages, including lost compensation and benefits, other monetary losses and other relief, including reinstatement or promotion.

Employee Notice Rules

The proposed regulations make small changes to the rules regarding when an employee must give the employer notice of a foreseeable FMLA leave. Currently, an employee must give notice for a foreseeable leave at least 30 days in advance. If 30 days advance notice is not practicable, the employee must give notice to the employer “as soon as practicable,” which under the current regulations had been defined as “within one or two business days of when the need for the leave becomes known to the employee.” The proposed regulations would delete this definition and instead make it clear that the DOL expects that it will be practicable for the employee to provide notice of the need for leave either the same day or the next business day.

Medical Certifications

The proposed regulations attempt to streamline the medical certification process. They clarify that medical certifications must be “complete” (leaving no applicable entry blank) and “sufficient” (giving answers that are responsive, and not vague or ambiguous.) If the certification is either incomplete or insufficient, the employer must give the employee an opportunity to cure the certification’s defects by stating in writing what additional information is required and giving the employee 7 calendar days to cure. The proposed regulations also allow the employer to directly contact the employee’s health care provider for the purposes of authenticating and clarifying the medical certification. However, an employer may only do so after the employee has been afforded the opportunity to cure any deficiencies in the certification, and an employer may not ask health care providers for additional information beyond what is required in the certification form. Finally, the proposed regulations state that the doctor may but is not required to give a diagnosis on the medical certification.

Fitness-For-Duty Certifications

The proposed regulations retain the current fitness for duty certification procedures, but state that an employer may contact the employee’s health care provider directly for purposes of authenticating and clarifying the fitness-for-duty statement, under the same procedures proposed for initial medical certifications. The employer may also provide the employee with a list of essential job functions and require that the employee’s medical provider certify that the employee can perform them. However, if the employer wishes to provide the employee with a list of essential functions, it must do so when it provides the employee the eligibility notice. For employees that have taken intermittent leave, the proposed regulations permit the employer to require a fitness-for-duty certification every 30 days if the employee has taken intermittent leave during that period and reasonable safety concerns exist.

Intermittent Leave

You may note that there have been no major regulatory changes proposed for intermittent leaves and reduced leave schedules. This is a disappointment to employers and others who find the regulations on these types of leaves confusing and difficult to administer. The only clarification noted to have an effect on

intermittent leaves deals with leaves for chronic conditions. The current regulations provide that a chronic serious health condition is one that involves “periodic treatment.” The proposed regulations define “periodic treatment” as treatment at least 2 times per year.

The Notice of Proposed Rulemaking also set forth a series of questions in anticipation of drafting regulations concerning the new FMLA provisions for military family members. Those questions are summarized in our February *Briefing*, “Military Family Leave Questions.” The DOL has given employers and others until April 11, 2008 to submit comments on all of the proposed regulations. For those seeking more details, the Notice of Proposed Rulemaking can be found at:

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