Briefing

Family and Medical Leave Act Changes, Part II: FMLA Administration

January 2009

The Family and Medical Leave Act (FMLA) has undergone significant changes in the last year. Our December 2008 *Briefing* detailed the regulations governing military family leaves. This *Briefing* will deal with the many changes the new regulations have made to traditional FMLA administration. The changes discussed below are effective as of January 16, 2009.

Employer's Notice Obligations

The new regulations change notice of leave requirements for both employers and employees.

- **General Notice** – The general notice regulations require that an employer must post the notice in a language its employees are literate, where a significant portion of employees cannot read English. The new regulations also allow for electronic posting under certain circumstances.
- **Eligibility Notice** – As we noted in our March 2008 *Briefing* on the proposed regulations, the employer will now have five (5) business days to issue a written Rights and Responsibilities notice to each employee taking FMLA leave. (A template for this notice is available at the Department of Labor's (DOL) FMLA website, a link to which is included at the end of this *Briefing*.)
- **Designation Notice** – The DOL also changed the designation notice period from two (2) days to five (5). Therefore, an employer will have five days after receipt of the employee's complete certification and all accompanying information to designate the leave as FMLA-qualifying.
- **Consequences of Failing to Provide Notice** – The new regulations allow the employer to be sued for monetary damages for failure to follow FMLA notice requirements.

Employee Notice Rules

The new regulations make minor changes to the rules regarding when an employee must provide the employer notice of a foreseeable FMLA leave. Under the old rules, an employee was required to give notice for a foreseeable leave at least 30 days in advance. This rule hasn't changed. In cases where 30 days advance notice was not practicable, the employee was previously required to give notice to the employer "as soon as practicable," defined as "within one or two business days of when the need for the leave becomes known to the employee." The new regulations 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. Additionally, the new regulations permit employers to request an explanation of why it was not practicable to give the full 30 days notice from employees who give less notice.

Definition of Health Care Provider

The definition of health care provider was expanded to include physician assistants (PAs). The DOL characterizes this change as a "clarification, not a significant change." Nonetheless, it is important to note the expanded definition of "healthcare provider" for purposes of the definition of "serious health condition" (see below).

© 2009 ***Innovative Care Systems, Inc.***

Medical Certifications

The new regulations 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 seven (7) calendar days to cure. In a significant departure from the old regulations, the new regulations allow the employer to directly contact the employee's health care provider for the purposes of authenticating and clarifying the medical certification. However, this provision is only extended to the employer after the employee has been afforded the opportunity to cure any deficiencies in the certification. While the employer may contact health care providers for additional information, as previously identified, the employers are still prohibited from inquiring about additional information beyond what is required in the certification form. Furthermore, the employee's direct supervisor cannot be the person who makes direct contact with the physician.

Fitness-for-Duty Certifications

The new 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 require a fitness-for-duty certification or provide the employee with a list of essential functions, it must notify the employee of these requirements no later than when it provides the employee the Designation Notice. For employees that have taken intermittent leave, the new 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.

Definition of Serious Health Condition

Although the DOL received many requests for clarification regarding 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 two of the five alternative definitions of "continuing treatment."

- **Incapacity and Treatment** — Incapacity and treatment still has two alternative sub-definitions:
  - Three (3) consecutive days of incapacity, plus two (2) visits to a health care provider. The new regulations clarify that the two visits to a health care provider must occur within 30 days of the period of incapacity, unless extenuating circumstances exist.
  - Three (3) consecutive days of incapacity, plus a regimen of continuing treatment. The new regulations require the first visit to a healthcare provider be within seven (7) days of the initial incapacity.
- **Chronic Conditions Definition** — The new regulations add to the definition of "chronic serious health condition" a requirement that the condition make the employee visit a healthcare provider at least twice a year.

© 2009 ***Innovative Care Systems, Inc.***

Intermittent Leaves

The new regulations make two minor clarifications to the rules surrounding intermittent leaves. They remind employees that take intermittent leave for planned medical treatment that they have an obligation to make a reasonable effort to schedule the treatment in a way that does not unduly disrupt the employer's operations. They also clarify the way in which an employer accounts for an absence of less than a full workday. Under the new regulations, while an employer may account for FMLA leave using shorter increments of time than it does for other types of leave, it may not use longer increments of time than it does for other types of leave.

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. The twelve months of employment are not required to 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 would qualify for an FMLA leave. The new regulations clarify that employment prior to a continuous break in service of seven years or more need not be counted, unless one of the two following circumstances exists.

- The break was for fulfillment of the employee's National Guard or Reserve military service duty. Moreover, the time served in fulfillment of those duties must be counted as time "employed" in determining whether the employee was employed for at least twelve months.
- A written agreement exists concerning the employer's intention to rehire the employee after a break in service. (An example would be a collective bargaining agreement that allows for a break in service for an employee to complete his or her education.)

Employers have the option to count service that was completed more than seven (7) years before the leave, as long as they do so for all employees who seek FMLA leaves. If the employer's records do not go back seven years, the burden of proving service not contained in the employer's records is on the employee seeking leave.

Light Duty

Sometimes an employee will return from a FMLA leave and take a light duty assignment, rather than return to their original job responsibilities. 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. An employee who voluntarily returns to a light duty position retains the right to restoration of their "same or equivalent position" (that is, the same or equivalent to the position they had before the FMLA leave). The employee has this right until the end of the 12-month period that the employer uses to calculate FMLA leave.

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 old regulations referred to "accrued paid vacation leave, or medical or sick leave." The new regulations clarify that any type of accrued paid leave 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

© 2009 ***Innovative Care Systems, Inc.***

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 take advantage of this new rule, the employer must, in the Rights and Responsibilities notice, make the employee seeking FMLA leave aware of any additional requirements for taking paid leave 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.

New Forms

The DOL has incorporated new forms related to these regulation changes. Links to these forms, including certifications of serious health conditions, notice of FMLA eligibility, notice of FMLA designation and the new FMLA poster can be found at the DOL website link below:

http://www.dol.gov/esa/whd/fmla/finalrule.htm

Bonuses and Awards

The new regulations allow an employer to deny a bonus or other payment to an employee who has taken an FMLA leave if:

1. the award or payment is based on the achievement of a specific goal (i.e., hours worked, products sold or perfect attendance),
2. the employee has not met the goal due to FMLA leave, and
3. the same rule is applied to employees taking non-FMLA leaves.

Bonuses that are not based on the achievement of a specific goal, (like a $50 gift card given to all employees at the holidays) may not be denied to employees who took FMLA leave.

Joint Employers

Employers are only required to give an employee FMLA leave if they employ 50 or more employees within 75 miles of the employee's worksite. Generally, 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 temporary or leasing agency), the secondary employer has some responsibility to accept the returning employee if it still leases employees from the primary employer.

The new 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 new regulations are not joint employers for FMLA purposes, provided that they (1) do not have the right to hire, supervise or determine employee rates of pay; and, (2) do not benefit from the work the employees perform.

© 2009 ***Innovative Care Systems, Inc.***