

Department of Labor Publishes Proposed FMLA Regulations

Alert

On February 11, 2008, the Department of Labor (DOL) published proposed revisions to the regulations implementing the Family and Medical Leave Act (FMLA). The following is a summary of the principal proposed regulatory changes:

- *Serious Health Condition:* The proposed regulations provide that in order to fall under the definition of a "serious health condition" as one involving more than three consecutive days of incapacity plus "two visits to a health care provider," the employee's two visits must occur within 30 days of the beginning of the period of incapacity. In addition, the proposed regulations clarify that employees who suffer from a "chronic serious health condition" are covered by the FMLA as long as the condition requires that they visit their health-care provider at least two times per year.
- *Notice Obligations for Employers and Employees:* The proposed regulations require employers to provide more detailed and thorough notices, and also change the time periods for providing notice. In addition to posting general notice of employees' FMLA rights, employers must include notice of those rights in an employee handbook or distribute such notice to employees once per year. Employers must also notify employees of their eligibility for FMLA leave (and of any medical- or fitness-for-duty-certification requirements) within 5 days of acquiring knowledge that the leave might be for an FMLA-qualified reason, and, if the employee is not eligible, must indicate the reasons for ineligibility. If the employee is eligible for FMLA leave, the employer must designate the leave as FMLA leave within 5 business days of acquiring sufficient information to determine that the leave is for an FMLA-qualified reason, and must provide follow-up designation notices every 30 days if the length of leave is indeterminate. The proposed regulations also impose additional notice requirements on employees by allowing employers to require employees to comply with established call-in procedures if they are unable to work.
- *Intermittent Leave:* Due to the administrative burdens of providing intermittent leave (and especially unscheduled leave) under the current regulatory scheme, employers had overwhelmingly requested changes that would provide significant relief. Citing the language of the statute, the DOL to date has declined to propose changes that would permit employers to transfer or otherwise alter the duties of employees who take unscheduled or unforeseeable intermittent leave or to increase the minimum increment of intermittent leave. The DOL has, however, left the door open by inviting further comment on both of these issues. The proposed regulations do clarify that, in keeping with the language of the statute, employees must make a "reasonable effort" (as opposed to an "attempt") to schedule their leave so that it does not unduly disrupt an employer's operation. In addition, the proposed regulations permit employers to require employees who take intermittent leave to comply with established call-in procedures.

- *Medical Certifications:* The proposed regulations allow employers, provided that they comply with HIPAA's privacy regulations, to contact health-care providers directly for the purpose of clarifying an employee's medical-certification form — whereas under the current regulations, employers may only have their own health-care provider contact the employee's health-care provider. The proposed regulations include a revised medical-certification form, which, unlike the current form, allows health-care providers to provide information about an employee's symptoms, diagnoses, and medications, although employers may not require such information. The proposed regulations also allow employers regularly to request recertification of an employee's ongoing health condition.
- *Attendance Bonuses:* The proposed regulations provide (contrary to the present regulations) that an employer may disqualify employees on FMLA leave from eligibility for attendance bonuses, such as "perfect attendance" awards, as long as the employer treats employees on non-FMLA leave identically.
- *Fitness-for-Duty Certifications:* The proposed regulations allow an employer to require that an employee's fitness-for-duty certification at the conclusion of FMLA leave address the employee's ability to perform the essential functions of his/her job and, where reasonable job-safety concerns exist, that an employee on intermittent leave also submit such a certification before returning to work.
- *Waiver of Rights/Claims:* The proposed regulations confirm that (contrary to a Fourth Circuit decision) employees and employers may voluntarily settle disputed FMLA claims without the prior approval of a court or the DOL.
- *Substitution of Paid Leave for FMLA Leave:* The proposed regulations clarify that an employer may apply its normal leave rules when an employee substitutes paid vacation or personal leave, or leave under a "paid time off" plan, for FMLA leave.
- *Retroactive Designation of FMLA Leave:* In recognition of the Supreme Court's 2002 decision in *Ragsdale v. Wolverine World Wide, Inc.*, the proposed regulations allow employers to retroactively designate an employee's leave as FMLA leave, provided that the failure to timely designate the leave did not harm the employee.
- *Leave for Families of Military Servicemembers:* The proposed regulations do not cover the new leave provisions for families of military servicemembers, but instead invite public comment on these new provisions as well as in response to specific questions related to them. As detailed in our February 5, 2008 client alert, these provisions were added to the FMLA by way of the National Defense Authorization Act for FY 2008 (NDAA), which President Bush signed into law on January 28, 2008.

Department of Labor Publishes Proposed FMLA Regulations

Employers can view the full-text version of the proposed regulations at the following page on the DOL's Web site: <http://www.dol.gov/esa/whd/fmla/FedRegNPRM.pdf>. Comments on the proposed regulations may be submitted electronically until midnight on April 11, 2008 at <http://www.regulations.gov>. The DOL intends to review the public's comments and to issue the final version of the new FMLA regulations prior to the expiration of President Bush's current term. For additional guidance from the DOL on the proposed regulations and a step-by-step tutorial on the e-submission process for comments, please visit: <http://www.dol.gov/esa/whd/FMLANPRM.htm>.

If you have any questions about the new provisions, please contact Ellen Martin at 212.336.2860, Lisa Cleary at 212.336.2159, Catherine Williams at 212.336.2207, or Benjamin Litman at 212.336.2254.

This alert is for general informational purposes only and should not be construed as specific legal advice.

IRS Circular 230 disclosure: Any tax advice contained in this communication (including any attachments or enclosures) was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed in this communication. (The foregoing disclaimer has been affixed pursuant to U.S. Treasury regulations governing tax practitioners.)

To subscribe to any of our publications, call us at 212.336.2329, email: info@pbwt.com, or sign up on our website, www.pbwt.com/resources/publications.