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Proposed Rule on the Family Medical and Leave Act

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On February 11, 2008, the Department of Labor published proposed rule changes for the Family Medical and Leave Act (FMLA). These regulatory changes would be the most sweeping modifications to FMLA regulations since their initial implementation on April 6, 1995.

The FMLA provides up to 12 weeks of unpaid time off in any 12-month period as family and medical leave. Such leave includes care for a serious health condition of the employee or an immediate family member, as well as leave for the birth, adoption or foster placement of a child. Since its enactment 15 years ago, the FMLA has been the subject of legal challenges regarding its interpretation and administration. Concerns about the law include confusion about the proper definition of "serious health condition," ambiguous standards for verifying medical certification requirements and disclosure restrictions, and the difficulty of enforcing shorter, incremental leave, known as "intermittent leave."

Proposed Changes

The proposed rules offer some important changes, some of which may be favorable to employers. Some highlights from these proposed changes include:

Employer Notice

Under the proposed rules, employers must still post a notice of general FMLA rights and responsibilities. In addition to this standard posting requirement, however, employers will also be required, on an annual basis, to distribute notice of FMLA rights to each employee. This distribution of annual notice can occur through an employee handbook, if one exists, or through paper or electronic form, subject to certain conditions. The Department of Labor seeks to increase employees' awareness of the FMLA through this change.

Additionally, an employer will have five business days (rather than the current two days) to notify an employee that he or she is eligible for FMLA leave upon receiving a request for leave or after learning that an employee's leave may qualify for FMLA leave.

The proposed rules would also require employers to provide employees with more specific written notice regarding FMLA leave requests. For instance, where possible, an employer must notify employees regarding the number of hours, days or weeks that an employer will designate as FMLA leave. Employers must also notify employees if leave will not constitute FMLA leave due to insufficient information or a non-qualifying reason.

Employee Notice

Under the current regulations, employees must provide 30 days notice of a need for FMLA leave when the need is foreseeable and in compliance with the employer's usual procedures. If 30 days' notice is not possible, the employee must give notice "as soon as practicable." Although the current requirements will remain the same, the Department

of Labor further proposes to add that when an employee gives less than 30 days' advance notice, the employee must respond to a request from the employer and explain why it was not practicable to give 30 days" notice.The Department of Labor hopes to reduce disruptions caused by unforeseen absences with this proposed change.

Medical Certification

Management and workers have often clashed on whether proper or sufficient medical documentation has been provided to determine whether or not the worker qualifies for unpaid leave under the FMLA. The proposed rule seeks to clarify medical certification requirements, including making an important change that may permit employers to contact an employee's health care provider.

Consistent with the notice requirement change, employers would have five days to request medical certification from the date of the employee's request for leave. If an employer determines that the subsequent information received is insufficient, the employer must provide written notice to the employee of what additional information is necessary and give the employee seven calendar days to cure the deficiency. The Department of Labor has also proposed changes to the medical certification form to better enable health care providers to understand and complete this certification. Employers would also be permitted to contact health care providers directly to clarify or authenticate documents.

The proposed regulations would permit employers to send an employee's absence schedule to his or her health care provider to confirm whether or not the employee's pattern of intermittent leave is congruent with the employee's qualifying medical condition.

Consistent with current regulations, an employer would not be able to require a recertification until the specified duration of the initial certification expires, but in all cases recertification requests would be permitted every six months.

Intermittent Leave

One of the most sought after changes, the permitted length of intermittent leave, will remain untouched. Currently, employees may take the shortest unit of unpaid leave established under an employer's timekeeping systems. Employers find administering such leave burdensome and have advocated increasing the minimum to at least a half-day. The Department of Labor, however, has determined that it does not have the authority to alter incremental leave and that any such changes must be made legislatively.

'Serious Health Condition'

Currently, under the FMLA, it is unclear what constitutes a "serious health condition." The Department of Labor outlines this difficulty in the proposed regulations, but proposes only modest changes to clarify this issue. For instance, under the proposed rule, "continuing treatment" for purposes of establishing a "serious health condition" would be clarified to a period of incapacity of more than three consecutive calendar days and require that a worker visit a health care provider twice within 30 days of being incapacitated. Those with chronic conditions must make two visits per year to a health care provider.

Fitness for Duty

If an employer requires a fitness-for-duty certification, the proposed regulations would allow an employer to include a description of the essential functions of the employee's job along with its eligibility notice to the employee. Employees on intermittent leave could be required to provide fitness-for-duty certifications every 30 days if reasonable safety concerns exist. Additionally, subject to certain limitations, employers would be permitted to contact health care providers to clarify or authenticate the fitness-for-duty certification.

Coordination with Paid Leave

Under the current regulations, employees must follow the terms and conditions of an employer's paid leave policy in order to utilize accrued paid leave during FMLA leave. The proposed regulations will clarify the concept that unpaid FMLA leave runs concurrently with paid leave provided by an employer.

Perfect Attendance Awards

An employer would not have to provide perfect attendance awards to employees who take unpaid leave under the FMLA.

Waiver and Release

A recent court decision brought into question the ability of an employee to voluntarily settle a claim under the FMLA. The proposed regulations clarify that employers and employees are permitted to voluntarily settle past FMLA claims without having to obtain permission from a court of law or the Department of Labor.

'Light-Duty Time'

The Department of Labor is proposing to eliminate a provision in the current regulations concerning light-duty time. The elimination of this provision will ensure that employees retain their right to reinstatement for a full 12 weeks of leave instead of having the right diminished by the amount of time spent in a light-duty position.

Military Leave

The proposed rules will also include regulations concerning recently enacted legislation providing FMLA leave to military personnel and their family members.

As noted in Buchanan Ingersoll & Rooney's January Labor & Employment Legislation & Regulation Update, President Bush signed a new law that provides two new types of FMLA leave related to military service. Pursuant to the new law, an eligible employee can take up to 26 weeks of leave in a 12-month period to care for a spouse, child, parent or next of kin who is a service member with a serious illness or injury incurred during active duty in the Armed Forces. Additionally, the law permits eligible employees to take up to 12 weeks of FMLA leave in a 12-month period for "any qualifying exigency" that arises from a spouse's, child's or parent's active duty in the Armed Forces, including an order or call to duty.

Outlook

Comments on the proposed changes must be submitted to the Department of Labor by April 11, 2008. It is expected that the final rules will be published before President Bush leaves office.

House Education and Labor Committee Chairman George Miller (D-CA) has already expressed concerns about the proposal. Representative Lynn Woolsey (D-CA), who chairs the Workforce Protections Subcommittee on the panel, has scheduled a hearing on the FMLA for Thursday February 14. The Senate Children and Families Subcommittee of the Health, Education, Labor and Pensions Committee, which is chaired by Senator Chris Dodd (D-CT), will hold a similar hearing a day earlier. Each is expected to criticize the tenor of the proposed rule and examine ways in which to broaden the FMLA.

If you would like more information about the proposed FMLA regulations, desire to submit a comment or join a coalition seeking to address this issue and other labor and employment issues, please contact one of our Labor and Employment or Federal Government Relations professionals. Additionally, you may review the entire proposed regulation.

For more information, email the author(s) at **leadvisory@bipc.com**.

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