

Management Alert

DOL Proposes New FMLA Regulations After Congress Expands Statutory Protections

Following recent military-related amendments to the Family and Medical Leave Act, the U.S. Department of Labor has proposed changes to existing FMLA regulations. The DOL's proposed changes build on the agency's December 2006 Request for Information, whereby DOL sought public comments on numerous FMLA issues. Among other items, DOL's recent proposals address what constitutes a serious health condition; substitution of paid leave; notice requirements for employees and employers; and medical certification procedures.

The proposed regulations are intended to help employers curb FMLA abuse, while at the same time facilitating leave for eligible employees. Seyfarth Shaw will be submitting comments on the proposed regulations on behalf of the Society for Human Resource Management and other employer stakeholder groups, as we did in response to DOL's 2006 Request for Information. Client input and participation are welcome.

The new regulations are slated to take effect later this year. In that event, employers and employees alike should better understand their FMLA obligations. Meanwhile, the new FMLA military leave requirements, particularly as

yet undefined "qualifying exigency" leave requirements, increase employer obligations under an already complex statute. [Click here to view our previous Management Alert regarding FMLA military leave.](#)

Proposed Regulations

The proposed regulations would reorganize the regulatory scheme to address many issues raised by both employer and employee groups in response to DOL's Request for Information. A few highlights of the proposed regulations follow:

Medical Certification Process

There are a number of very positive changes to the medical certification process. With the employee's consent, employers will be able to contact an employee's health care provider directly to clarify medical documentation; an employee's failure to consent may jeopardize his or her leave rights. In addition, an employer will be able to authenticate the certification directly with the health care provider, even without the employee's

consent. The DOL has also proposed changes to the medical certification form itself, which will give employers more detailed information regarding the underlying serious health condition.

Serious Health Condition

The DOL continues to take the position that the common cold and flu may be serious health conditions under certain circumstances. On a more positive note, employees claiming a chronic serious health condition will be required to have treatment two or more times a year in order to satisfy the existing “periodic visits” requirement.

Intermittent Leave

The DOL declined to limit leave to half-day increments and to require employees to submit a fitness-for-duty statement for intermittent days of absence. However, employers will be able to require a fitness-for-duty statement every 30 days if an employee has used intermittent leave during that period and reasonable safety concerns exist.

Employee Notice

The employee must notify an employer “as soon as practicable” when leave is not foreseeable. The DOL expects the employee can practicably notify the employer either the same day (if the employee becomes aware of the need for leave during work hours) or the next business day (if the employee becomes aware of the need for

leave after work hours). Accordingly, the proposed regulations will generally allow employers to enforce their call-in procedures without running afoul of FMLA notice requirements. Confirming well-established case authority, the proposed regulations make clear that an employee who says he or she is “sick” will generally *not* put the employer on notice of the need for leave.

Employer Notice

Citing a need for better communication to employees regarding FMLA leave, the proposed regulations impose additional administrative burdens on employers by requiring that notices to employees contain more detailed information, such as how much leave is available, why the employee is not eligible, and how much intermittent leave has been taken in the last 30 days. However, the time-frame for providing such notice will be expanded to five business days rather than the current two business days.

Bonuses

The proposed regulations permit employers to deny a perfect attendance or similar bonus if employees fail to meet the required goal due to an FMLA absence, provided the bonus is denied to employees on other types of leave.

Waivers

Rejecting the Fourth Circuit Court of Appeals’ view, the proposed regulations confirm that waivers of past FMLA claims are permissible.

Servicemember-related Leave

By posing a series of questions, the proposed regulations also request comments on the recent servicemember-related leave amendment. According to DOL, servicemember-related regulations issued after the 60-day comment period will be final, instead of proposed or interim.

Recommendations for Employers

Pending issuance of the final regulations, employers should:

- Advise employees of the new servicemember-related leave amendment by posting DOL's new notice where the employer posts its current FMLA notice. Alternatively, you can use Seyfarth's customized, FMLA-compliant notice, which contains additional clarifying information available by [clicking here](#).
- If it is practicable, revise their FMLA policy and forms to reflect the new types of servicemember-related leave. An employer also should decide whether it will grant "qualifying exigency" leave pending issuance of DOL's final regulations.

Once the regulations are final, employers should further revise the FMLA policy, forms and procedures and train those responsible for FMLA compliance on the impact of the final regulations. Employers in states with family or medical leave and/or servicemember-related leave laws should also address the interaction of those laws, the final regulations, and the new servicemember-related amendment.

Seyfarth Shaw will, of course, be providing complete details when the regulations are final, which we anticipate will be sometime during the summer of 2008. In the interim, should you have any questions regarding the FMLA military leave requirements or the proposed regulations, please contact the Seyfarth Shaw attorney with whom you work, or any Labor & Employment attorney on our website, www.seyfarth.com.

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