Management Alert

Revised FMLA Regulations Set to Impose New Employer and Employee Obligations

On November 17, 2008, the U.S. Department of Labor (DOL) issued revised regulations interpreting the Family and Medical Leave Act of 1993, as amended. These are the first revisions to the regulations since they were issued in April 1995. Barring any action on the part of Congress (which is not presently expected), the revised regulations are set to go into effect on January 16, 2009.

The DOL's decision to overhaul the regulations dates back to late 2006, when the DOL first issued a request for information (RFI) from the public on what needed to be changed in the regulations. In response to the RFI, the DOL received thousands of comments from employer and employee groups, as well as from the medical community. The DOL then held a stakeholders' meeting to gather additional information on how to change the medical certification process. This culminated in the issuance of proposed revisions to the regulations in February 2008. Again, thousands of comments were submitted, and the DOL issued a detailed summary of the comments as part of the new regulations.

The new regulations change some of the former interpretations, and renumber and reorganize certain provisions. DOL has also revised some sections to include language clarifying several provisions that had been subject to conflicting court interpretations. In addition to reorganizing, modifying, and clarifying existing regulations, the DOL issued new regulations addressing the January 2008 servicemember amendment to the FMLA, which provides leave for qualifying exigencies for eligible family members of personnel on active duty and to care for ill or injured servicemembers.

In undertaking to update the regulations, the DOL was faced with the difficult task of balancing the conflicting interests of employers and employees, as well as the health care providers who are required to certify serious health conditions. Overall, the new regulations benefit employers more than they do employees, and impose additional obligations on health care providers.

There were many changes to the regulations and the following discussion does not address every change or clarification made to the regulations. Rather, we have selected what we believe are the most significant changes and/or clarifications for our clients, as they begin to review and revise their FMLA policies and procedures in order to bring them in compliance with the new regulations. For those interested in reading the new regulations and the DOL's accompanying commentary, this information is available at (*http://www.dol.gov/esa/whd/fmla/finalrule.htm*).

A Summary of Significant Regulatory Changes

Employee Eligibility

For purposes of determining whether an employee has been employed by an employer for at least 12 months and has worked at least 1,250 service hours, the DOL made the following minor changes or clarifications to 29 C.F.R. § 825.110 (hereinafter referenced by section only). The revised regulation:

- Clarifies that the 12 months of employment need not be consecutive, but employers need not count a break-in-service of seven years or more in determining whether an employee has been employed for at least 12 months. This is a change from the proposed rule issued in February 2008, which provided that the break-in-service would be five years.
- Provides two exceptions to the seven-year break-in-service rule: 1) an employee's fulfillment of his/her military obligations, and 2) a period of approved absences or unpaid leave, such as for education or child-rearing purposes, where a written agreement or collective bargaining agreement exists concerning the employer's intent to rehire the employee. If either circumstance exists, the employee's prior employment would count towards the 12 months of employment regardless of how much time has lapsed between the two periods of employment.
- In order to comply with the Uniformed Services Employment and Reemployment Rights Act (USERRA), time spent fulfilling an employee's military service obligations (National Guard or Reserve) is counted toward the employee's 1,250-hour and 12-month requirements. This particular change was the subject of a DOL pronouncement issued several years ago.
- Clarifies that an employee who is not eligible for FMLA protection at the beginning of his or her leave, may begin FMLA once he/she has met eligibility requirements. The revised regulation does not eliminate the requirement that an employee may apply time spent on vacation or sick leave towards the 12-month requirement, provided that he/she remains on the employer's payroll and is receiving other benefits. The revised regulation is contrary to several court cases that have held that eligibility is determined as of the date the initial leave commences.

Serious Health Condition

Although the DOL received many comments from employer groups urging changes in the definition of a serious health condition, particularly the sometimes troublesome "chronic serious health condition," the DOL did not overhaul the basic definition. The definition of a serious health condition still includes the list of conditions outlined in current section 825.114. In response to significant employer concerns, the DOL now provides greater clarity with respect to what is meant by "continuing treatment." An employee who is incapacitated for more than three consecutive full calendar days must show that he/she is receiving continuing treatment from a health care provider in order to satisfy the definition of a serious health condition. In a new section, § 825.115, in order to satisfy the "continuing treatment" requirement, an employee:

- Must visit a health care provider two times within 30 days of the first day of incapacity, unless extenuating circumstances exist that prevent a follow-up visit;
- Must see a health care provider within seven days of the first day of incapacity.
- With a chronic serious health condition, must visit a health care provider at least twice a year.

The changes to the "continuing treatment" section will result in uncertainty as to whether these types of absences count as an FMLA absence, given that the employee now has up to 30 days to either receive treatment a second time from a health

care provider or to have a regimen of continuing treatment following the first treatment by the health care provider.

Computing FMLA Leave During a Holiday Week

Whether an employee is charged FMLA leave for a holiday depends on whether he/she needs to take FMLA leave for a full or partial work week. The revised regulation, § 825.200, provides the following clarification:

- An employee taking a full week of FMLA leave during a week containing a holiday will have the holiday counted against his or her FMLA allotment.
- An employee taking less than a full week of FMLA leave during a week containing a holiday will not have the holiday counted against his or her FMLA allotment unless the employee was otherwise scheduled and expected to work the holiday.

Substitution of Paid Leave

The statute permits an employee to "substitute" paid leave for otherwise unpaid FMLA leave and also permits an employer to require this "substitution." The paid time "substituted" counts against the employee's FMLA entitlement. The DOL instituted the following additional changes or clarifications with respect to the substitution of paid leave in § 825.207:

- An employee who elects to take paid leave must follow the employer's paid leave policies with respect to use of that leave.
- An employer must make employees aware of any additional procedural requirements in conjunction with the use of paid leave. This information must be provided to employees in the rights and responsibilities notice. See further discussion below under Employer Notice Requirements.

This particular revision (which is basically unchanged from the proposal) was very controversial and opposed by employee groups. In the commentary accompanying the revised regulations, the DOL states that if an employee wants to use accrued vacation, but only needs two hours of leave, the employee can be required to take a full day of vacation if the employer's paid leave policies require, for example, that such leave be taken in increments of no less than a full day. The employee's other option is to take two hours of unpaid time.

Perfect Attendance, Production Bonuses

The current section of the regulations covering bonuses (§ 825.215) has been a subject of great confusion for employers, as the DOL made distinctions between bonuses based on the absence of occurrences (such as perfect attendance or safety) and bonuses based on achievement of goals (such as production bonuses). The new regulation eliminates this distinction. New § 825.215 covers the payment of bonuses premised on the achievement of a specific goal (e.g., perfect attendance) by allowing an employer to disqualify an employee who has not achieved the goal due to employee's use of FMLA leave, provided that:

- Employees taking non-FMLA leave are treated the same as employees taking FMLA leave.
- Employers are not prohibited from prorating such bonuses or awards, if they wish to do so.

Light Duty

An FMLA eligible employee who is unable to perform any one of the essential functions of the job due to a serious health condition is entitled to FMLA leave and may not be required to accept a light duty assignment. However, many employers have light duty programs, particularly for work-related injuries, and refusing light duty often leads to a denial of workers' compensation benefits. In response to conflicting case law, the DOL revised § 825.220 to clarify the impact, if any, of taking a voluntary light duty assignment on an employee's FMLA entitlement:

- Light duty work does not count against an employee's FMLA entitlement.
- An employee's right to restoration is held in abeyance while he/she is on light duty up to the end of the applicable 12-month FMLA leave year.

Waiver of Rights

In response to conflicting case law, including a Fourth Circuit Court of Appeals case that specifically held that FMLA rights may not be waived without DOL or court approval, the DOL revised § 825.220 to clarify that:

- An employee may voluntarily settle or release FMLA claims based on past employer conduct without first obtaining DOL or court approval for such settlement or release.

Employer Notice Requirements

The DOL has consolidated all employer notice requirements under one section, § 825.300, for purposes of ease and clarity. Under the current regulations, there are two notices – the FMLA poster (Form WH-1420) and the Employer Response form (Form WH-381). Under the revised regulations, there are three employer notices: (1) a new poster, replacing the one issued in 1995; (2) a new Notice of Eligibility and Rights and Responsibilities form, which along with portions of new Form WH-382, replaces the current Form WH-381, and (3) a new form called Designation Notice, which is Form WH-382. These three new forms are attached to the regulations at Appendix C, D, and E. The regulations specify when and how these notices must be distributed to employees, and what penalties may be imposed in the event the employer fails to comply with the notice requirements:

- *Form WH-1420 - Poster/General Notice.* A covered employer is required to post and distribute a general notice, even if its employees are not eligible to take FMLA leave. The general notice must also be provided to each employee by including the notice in employee handbooks or other policy guides, or if employers do not maintain handbooks or policy guides, by providing the notice to new employees at the time of hire. The DOL has drafted a revised general notice form, titled "Notice to Employees of Rights Under FMLA" for employers to use. It replaces the current form going by the same name and publication number.
- *Form WH-381 - Notice of Eligibility & Rights and Responsibilities.* An employer is required to provide an eligibility notice within five business days (absent extenuating circumstances) of being advised by the employee that he/she needs to take FMLA leave or has been made otherwise aware of the employee's need for such leave. Currently, employers must provide such notice within two business days. This form replaces the current DOL form of the same publication number, titled "Employer Response to Employee Request for Family or Medical Leave." The new form differs from the current form; notably, if an employer advises the employee that he/she is not eligible for FMLA leave, the employer has

to provide at least one reason why the employee is not currently eligible for such leave. Along with the eligibility notice, an employer must provide the employee with a notice containing his or her FMLA rights and responsibilities. This information appears in the DOL's new Form WH-381 under Part B, and is titled "Rights and Responsibilities for Taking FMLA Leave."

- *Form WH-382 - Designation Notice.* Once an employer has sufficient information to determine whether an employee's leave is FMLA qualifying, an employer has five business days (absent extenuating circumstances) to provide the employee with a notice stating that the leave (specifying the amount) has been designated as FMLA qualifying or that additional information is needed in order to determine whether the leave is FMLA qualifying, and setting forth what additional information is needed. The DOL has drafted a new form, titled "Designation Notice" that employers may use. If an employer requires the substitution of paid leave, the designation form must include a statement to that effect. This form also advises the employee of the right to request the amount of FMLA time counting against his or her entitlement once in a 30-day period if leave was taken in the 30-day period. If an employer wants an employee returning from FMLA leave to provide a fitness-for-duty (FFD) certification, a statement to that effect must be included in the designation notice, along with a list of the employee's essential job functions, which will be provided to the physician responsible for completing the FFD certification.
- *Penalties.* In the event an employer fails to comply with the notice requirements set forth in § 825.300, it may be found liable for monetary losses sustained as a direct result of employer's failure to comply. In § 825.301, the regulations address an employer's liability for failure to designate an employee's leave as FMLA qualifying, which, consistent with the Supreme Court's *Ragsdale* decision, now requires a showing that the employee suffered an actual injury due to the employer's failure to designate the leave as FMLA qualifying. For example, an employee may not have wanted to use FMLA leave for a particular absence because he/she had surgery scheduled for later in the year and wanted to reserve his or her FMLA allotment for that purpose in order to maintain his or her job restoration rights.

Employee Notice Requirements

The DOL's revisions to the employee notice requirements, under §§ 825.302 and 825.303, will enable employers to better anticipate their employees' need to take foreseeable and unforeseeable leave:

- An employee now must comply with an employer's usual and customary notice/procedural requirements for requesting leave, absent unusual circumstances. In other words, an employer can require that an employee provide written notice of his or her need to take leave or notify a specific individual of the need for leave.
- An employee's failure to comply with his or her employer's leave procedures can now be grounds for delaying or denying an employee's request for FMLA- qualifying leave.
- An employee seeking additional FMLA leave (for a previously certified condition) must specifically make reference to the FMLA or the previous condition for which FMLA leave was used.
- Notice of the need for unforeseeable leave must now must be given as soon as practicable under the facts and circumstance of the particular case (the reference to 1 to 2 business days was eliminated).

Medical Certification

The DOL has made several significant substantive changes to the medical certification process that should permit employers to obtain better medical information verifying the employee has a serious health condition and make it easier to

obtain medical information. New forms pertaining to the medical certification process can be found in Appendix B of the revised regulations. The revisions include:

- *New Forms 380-E and 380-F.* The current medical certification form has been replaced with two medical certification forms, one to be used for employees seeking leave for their own serious health condition (Form WH-380E), and one to be used for employees seeking leave to care for a family member (Form WH-380F).
- An employer may now request information about a health care provider's specialization and fax number, an employee or family member's diagnosis, certification from health care provider that intermittent or reduced leave is medically necessary, a statement pertaining to which essential job functions an employee cannot perform, and more detailed information on the anticipated frequency and duration of intermittent and reduced schedule leaves.

Clarification and Authentication of Certifications

Currently, employers are prohibited from directly contacting an employee's health care provider to discuss any aspect of the medical certification form. This has been a source of frustration for employers and has resulted in the bulk of delays in processing requests for FMLA leave. In response to employer concerns, the DOL has provided the following changes to § 825.307:

- An employer may now directly contact an employee's health care provider for purposes of authenticating information provided on a medical certification form without first obtaining an employee's permission. The rule specifies who may contact an employee's health care provider on behalf of the employer: a health care provider, HR professional, leave administrator, or management official. An employee's direct supervisor is expressly prohibited from contacting an employee's health care provider.
- An employer may now directly contact an employee's health care provider, in accordance with HIPAA, for purposes of clarifying information provided on the medical certification form. As noted above, the same rules apply with respect to those individuals who may contact an employee's health care provider.
- When an employee submits a medical certification form that is incomplete or insufficient the employer must advise the employee in writing as to what additional information is needed and give the employee seven calendar days (or longer if unable to comply within that time frame despite employee's diligent good faith efforts) to complete and return the form.

Second/Third Opinion Process

The following change has been made to the provisions in § 825.307 addressing second and third opinions:

- To facilitate the second/third opinion process, an employee must authorize the release of relevant medical information pertaining to the condition for which leave is being sought to the second/third opinion health care provider.

Other Changes to Medical Certification Rule

The following changes have been made to §§ 825.305 and 825.306, respectively:

- An employer may request that an employee provide annual medical certifications for medical conditions lasting in excess of a leave year.

- An employer may consider information about an employee's medical condition obtained while trying to determine disability status under the ADA or a workers' compensation program.

Recertification

The DOL has revised the rules pertaining to when and how often an employer may request a recertification of an FMLA-qualifying condition. The current rules on recertifications are complicated and have led to much confusion on when and how an employer may seek a recertification, particularly for episodic conditions. Note that the current and revised rule also provide that once an employer has requested a recertification, no second or third opinions may be required. The new rule provides:

- The general rule is that an employer may request recertifications no more often than every 30 days and only in connection with an absence, unless the minimum duration of the condition is more than 30 days.
- Recertifications may be requested in less than 30 days if the following circumstances exist: the employee requested an extension of his/her leave, circumstances stated in previous certification have changed significantly (e.g., duration/frequency of absence, nature/severity of illness), or employer receives information casting doubt on continuing validity of employee's certification.
- For employees requesting intermittent or reduced leave for periods in excess of six months, an employer may request recertification every six months in connection with an employee's absence.

Fitness-for-Duty Certification

As outlined in the employee notice section, an employee cannot be required to submit a fitness-for-duty (FFD) certification prior to reinstatement (following FMLA leave) unless he/she has been advised of this requirement in the employer's designation of leave notice. Additional FFD changes in § 825.312 include:

- The health care provider may be required to verify the employee is able to perform the essential functions of the job, if the employee was advised of this requirement in the Designation Notice. See § 825.312(b).
- For employees on intermittent or reduced leave, an employer may require a FFD certification to return from such an absence as often as once every 30 days if reasonable safety concerns exist regarding employee's ability to perform his/her duties.
- The authentication and clarification guidelines discussed under the medical certification section apply to FFD certifications.

Leave to Care for an Injured Servicemember

Effective January 28, 2008, an employee is entitled to take up to 26 weeks of leave in a single 12-month period to care for a covered servicemember with a serious injury or illness. The DOL did not circulate proposed regulations on the new leave provisions prior to issuing the final regulations. Rather, the DOL asked the public to respond to a series of questions that it released along with the proposed regulations earlier this year. The new regulations provide the first interpretative guidance on the new leave provisions:

- Employees may take leave to care for an injured servicemember who is the employee's spouse, parent, child, and

relatives for whom the employee is the "next of kin." Next of kin is defined in § 825.127 as the servicemember's nearest blood relative (aside from those individuals already named). The regulations prioritize who is considered next of kin but allow a servicemember to designate another blood relative as his or her nearest blood relative. In the event of such a designation, the designated individual will be the servicemember's only next of kin.

- Employees may take leave to care for an injured son or daughter who is 18 years of age or older. See § 825.122(g).
- The leave year is based on a single 12-month period and begins with the first day the employee takes leave. This differs from how a leave year is computed for all other forms of FMLA-qualifying leave, including exigency leave. See § 825.200.
- Leave is applied on a per covered-servicemember, per injury basis. See § 825.127.
- No more than 26 weeks of leave may be taken during any single 12-month period, regardless of the number of times such leave is sought. See § 825.127.
- A separate certification form, titled "Certification for Serious Injury or Illness of Covered Servicemember for Military Family Leave" (Form WH-385) has been drafted for employers to use if they wish. This form is located in Appendix H of the revised regulations.
- In connection with the certification process, an employer is permitted to obtain details about the servicemember's medical condition, such as whether the injury occurred in the line of duty, when it occurred, its probable duration, and the amount of time the servicemember will require care. See § 825.310.

Leave for a Qualifying Exigency

Although the DOL encouraged employers to start granting qualifying exigency leave soon after the FMLA was amended to add this new leave provision, albeit with little guidance on what would qualify as an exigency, this provision does not actually take effect until January 16, 2009. It is important to point out that this leave, which entitles an employee to take up to 12 weeks of leave due to a "qualifying exigency" arising out of the fact the employee's spouse, child, or parent has been called up to active duty, does not apply to family members of military members who are in the regular armed forces. Briefly, the new regulations provide the following guidance:

- A qualifying exigency includes: 1) short-notice deployment (limited to seven calendar days from date notified of deployment); 2) military events and related activities; 3) childcare and school activities; 4) financial and legal arrangements; 5) counseling; 6) rest and recuperation (limited to five days of FMLA leave); 7) post-deployment activities; and 8) additional activities (must be agreed to by both employer and employee). See § 825.126.
- Exigency leave applies to retired military members of the Regular Armed Forces, retired Reserve, Ready Reserve, Select Reserve, Individual Ready Reserve, or the National Guard. This provision does not apply to any retired member of a state Reserve or National Guard unit. See § 825.126.
- The leave year is based on a 12-month period and can be designated by the employer as the calendar year, a fixed 12-month period, a 12-month period measured forward or backward ("rolling" 12-month period) from the date of the employee's first absence. In other words, the employer's standard leave year applies to this type of leave (in contrast to the leave year required to care for an injured servicemember). See § 825.200.
- A separate certification form, titled "Certification for Qualifying Exigency for Military Family Leave" (Form WH-384) has been drafted for employers to use if they wish in conjunction with this leave. This form is located in Appendix G of the revised regulations.
- In connection with the certification process, an employer is permitted to ask for copies of the military member's duty

orders or other military documentation, facts regarding the exigency, dates of the military member's active duty service, and date of commencement of exigency. See § 825.309.

Recommended Actions for Compliance with the New Regulations

Employers should revise their FMLA policies as well as their procedures for administering FMLA leaves in light of the new regulations defining family military leaves and the new DOL recommended forms and processes. Training of human resource professionals as well as front-line managers to advise them of the changes is likewise prudent. Finally, the impact on the regulations of any state mandated family leave and family military leave laws should be evaluated.

On December 16, 2008, Seyfarth Shaw is hosting a webinar on the new regulations that will discuss the changes in greater detail (*The Family and Medical Leave Act - Final Regulations*). Seyfarth Shaw also has a Leave Management and Accommodation team that can help employers evaluate their current processes for managing leaves and requests for accommodations in light of the new regulations under the FMLA, as well as the recent amendments to the Americans with Disabilities Act.

For more information, please contact the Seyfarth attorney with whom you work or any Labor and Employment attorney on our website (*www.seyfarth.com/Labor and Employment*).

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