Law Offices of Mary L. Topliff
Workplace Wave

Flurry of Family and Medical Leave Act Activity: First-Ever Expansion and Proposed Regulations

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Employee Handbook Alert: FMLA Expanded to Include Military-Related Covered Leave

In January 2008, as part of a massive Defense Authorization bill, the Family Medical Leave Act (FMLA) was expanded to include two new categories of job-protected leaves of absence. The Department of Labor (DOL) will be issuing regulations to provide further guidance and definitions for some of the terms that are quite vague. Meanwhile, employers covered by FMLA must update their employee handbooks now to reflect these new legally sanctioned leaves of absence.

1. Leave Related to Active Military Duty

The newly-expanded FMLA now provides up to 12 workweeks of leave of absence entitlement within a 12-month period, "[b]ecause of any qualifying exigency arising out of the fact that the spouse, or a son, daughter, or parent of an employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation." The term "qualifying exigency" is not defined; presumably it refers to issues or activities that the employee must address because of the family member's call to active duty.

This type of leave may be taken intermittently or on a reduced leave

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Public Speaking

Ms. Topliff will be a featured speaker on "Legal Hot Buttons" at the national Property Casualty Insurers Association of America's Human Resources Conference on April 2, 2008 in Las Vegas, Nevada.

Ms. Topliff will be presenting the legal overview at the FMLA Briefing & Listening Session sponsored by the Society for Human Resource Management and the Northern California Human Resource Association on March 25, 2008 in San Francisco.

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schedule. The maximum job reinstatement period is combined with the previously-defined types of FMLA leave (i.e., the serious health condition of an employee or family member or new child bonding), such that a maximum of 12 weeks for all of these types of leave may be taken within the employer's pre-defined 12-month period.

2. Servicemember Family Leave

The other category of leave added to the FMLA provides up to a total of 26 workweeks of leave for eligible employees, defined as the spouse, son, daughter, parent or next of kin (defined as the nearest blood relative of the individual), to care for a covered servicemember (meaning a member of the Armed Forces, including National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is in outpatient status or is on the temporary disability retired list, for a serious injury or illness). The 26 weeks is to be available during a "single 12-month period," which is new terminology for FMLA. It is unclear whether this refers to a leave that can only be taken on one occasion over a single 12-month period or whether it is intended to refer to the 12-month pre-defined period (for example, a rolling 12-month period or fixed period). However, the new law does state that during this single 12-month period, the employee shall be entitled to a combined total of 26 workweeks of leave, including all other forms of FMLA leave.

For spouses employed by the same employer, they are entitled to an aggregate of 26 workweeks during the single 12-month period for servicemember family leave or a combination of servicemember family leave and other forms of FMLA.

The general FMLA eligibility requirements must be met for both types of leave, that is, the employee must have been employed for one year and worked at least 1,250 hours in the year preceding the leave of absence at a work location that has 50 employees or within a 75-mile radius of such a location. For either leave, where the necessity for the leave is foreseeable, the employee is required to provide reasonable advance notice. Employers may require that a request for active duty or call to active duty leave be supported by certification. A health care provider certification may be required for servicemember family leave.

Department of Labor Issues Proposed FMLA Regulations

On February 11, 2008, the Department of Labor issued proposed regulations that would replace the current FMLA regulations, triggering the formal rule-making process and the initial public comment period, which ends on April 11, 2008. Anyone who is interested in submitting comments (including objections, clarifications or factual scenarios of the impact of the regulations) may do so.

On March 25, 2008, the Northern California Human Resource Association and the Society of Human Resource

Management are hosting an event for human resource professionals in the Bay Area to provide feedback. I will be presenting the legal overview for this session.

The following are some of the highlights of the proposed regulations:

1. Eligibility: Length of Service

An employee must be employed for one year (or 12 months) before being eligible to take an FMLA leave. Neither the statute nor the current regulations specify whether this time needs to be consecutive. The proposed regulations clarify that time worked within five years from the date of the leave request will be counted towards this one year requirement, unless the break in service is due to military obligations or where such breaks are approved by written agreement with the employer or by collective bargaining agreement. This responds to a recent case (*Rucker v. Lee Holding Co.*) which held that all of the prior time that an employee had worked for the employer in the preceding five years counted towards the 12-month eligibility requirement. There, the court had noted that the FMLA regulations did not specify any limitation on breaks of service for this purpose.

2. "Serious Health Conditions"

The current FMLA regulations define "serious health condition" in various categories. One of the most problematic areas of FMLA administration for employers has been the category defined as a three-day consecutive period of absence plus continuing treatment by a health care provider on at least one occasion resulting in a regimen of continuing treatment (such as a prescription) or two visits to a health care provider. This category has encompassed various common, temporary medical conditions such as the flu and even the common cold, which were not intended to be covered by the FMLA.

The proposed regulations do not resolve this issue; they merely add that the definition of "continuing treatment" involving two visits to a health care provider must occur within 30 days from the beginning of the period of incapacity, such as when an employee is treated once and requires a follow-up visit for further evaluation or treatment.

The regulations also clarify that the definition of a "chronic" health condition would require periodic visits for treatment, meaning two or more per year. The DOL would like to know if this is an appropriate limitation.

3. Intermittent Leaves

The current regulations provide that an employee is to attempt to schedule foreseeable intermittent leave so as not to disrupt an employer's business operations. The proposed regulations provide a firmer requirement by establishing that the employee must make a "reasonable effort" to do so.

The current regulations provide that intermittent leave may be taken in the shortest period of time that the employer's

payroll system uses to account for absences, provided it is one hour or less. It further provides that an employee may not be required to take more FMLA time than is necessary (e.g., an employer may not require that intermittent leave be taken in minimum half-day increments). The proposed regulations continue these requirements. However, the Department seeks comment on whether it is more appropriate to extend FMLA protection to the employee's assigned schedule, rather than the actual leave time required, in situations in which it is physically impossible for the employee to begin or end work mid-way through a shift, for example, flight attendants.

4. Use of Vacation, Sick and Paid Time Off Benefits

Many employers prefer that employees receive their accrued vacation, sick or PTO time while they are on an FMLA leave. The current regulations state that an employee may choose or an employer may require that the employee substitute accrued paid leave for unpaid FMLA leave. In states like California that have state-provided disability and paid family leave benefits, employees are often receiving other income during the leave (sometimes throughout the leave period). The current regulations, albeit vaguely worded, state that an employee's receipt of "disability payments" under a benefit plan or through workers' compensation during an FMLA leave means that it is paid leave and as such, the substitution provisions do not apply. However, most disability insurance benefits do not provide full pay to the employee and thus, there remains an unpaid portion of the leave. The current regulations are silent on whether paid time off may or may not be used during that unpaid period.

The proposed regulations partially address this issue. They state that the employer and employee may agree, where State law permits, to have paid leave supplement the disability insurance benefits where the employee is not otherwise receiving full pay. However, they do not include this language when referring to the receipt of workers' compensation disability benefits.

5. Attendance and Incentive Awards

The DOL has proposed to allow employers to disqualify an employee who has had absences due to FMLA from receiving a perfect attendance or attendance-related incentive award, so long as non-FMLA absences are handled in the same manner. This would resolve the anomaly that occurs now when employees who have been absent for some time under FMLA receive perfect attendance awards because to do otherwise could be construed as adversely taking into account an FMLA-covered absence when computing compensation.

6. Employee and Employer Notice Requirements

The DOL notes that a key component of making the FMLA a success is effective communication between employees and employers. The proposed regulations provide a more streamlined approach to the employee and employer obligations in this regard.

The proposed regulations do not change the 30-day advance notice requirement of employees to request foreseeable FMLA leaves, but adds that if this notice is not provided, then employees must respond to an employer's request to explain the delay. For unforeseeable absences, employees are required to comply with an employer's call-in procedures. In response to a variety of court cases, the DOL has clarified that the employees' notice must be more than a statement that they are sick, rather they must indicate an inability to perform the essential functions of their job, the anticipated duration of the absence and indicate whether plans exist to visit a health care provider or receive continuing treatment. This latter point presupposes that employers must be authorized to request this information about medical treatment.

The current regulations provide that employers are to notify employees within one to two business days of the specific expectations and obligations of the employee. The DOL has proposed that employers provide notice regarding eligibility to employees within five days of the request or of the employer receiving knowledge that the leave may qualify as FMLA. It has provided a notice form for this purpose. The regulations would provide that employers must timely designate time off as leaves and that it can be made retroactively as long as the delay does not harm the employee. The employer and employee may mutually agree to retroactively designate leaves.

7. Medical Certifications

Under the proposed regulations, employers must request medical certification within five business days from the employee's notice of the need for leave or after the leave commenced in unforeseeable absence situations. Employees would then have 15 calendar days to submit the certification. The DOL has recently updated the Health Care Certification Form and seeks comments on its adequacy.

Many employers have struggled with uncooperative health care providers who have provided insufficient or confusing information. The proposed regulations provide a more detailed framework for certifications that are incomplete or inadequate. They provide that a certification is incomplete if one or more of the entries are not completed. The employer must specify, in writing, the information needed to remedy the certification. The employee would then have seven calendar days to remedy the deficiencies and the employee must provide a complete certification or give the health care provider authorization under the Health Insurance Portability and Accountability Act (HIPAA). The regulations clarify that if an employee cannot remedy the deficiencies, the employer may deny the FMLA leave.

The proposal allows employers to contact an employee's health care provider, without the employee's permission, to verify that the medical certification is

authentic if the employee was first given the opportunity to cure deficiencies. If, however, the employer wants to clarify the substance of a certification, it must comply with HIPAA. If an employee does not provide HIPAA consent and the employee has a legitimate need to clarify, FMLA leave may be denied.

According to the proposed regulations, recertifications may be requested no more than every 30 days and must be in connection with an absence. For serious medical conditions expected to last an extended period of time, recertification may be requested every six months. During this recertification process, employers may provide the employee's health care provider with a record of the employee's absences and inquire whether the pattern is consistent with the serious health condition.

Employers may require an employee to furnish a fitness for duty certificate every 30 days if an employee has used intermittent leave during that period and reasonable safety concerns exist. The employer may deny FMLA coverage for the period at issue if a medical certification is not provided in a timely manner.

To review the entire proposed regulations online, go to:

http://www.dol.gov/esa/whd/fmla/FedRegNPRM.pdf