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DOL Proposes Revised Family and Medical Leave Act Regulations

On February 12, 2008, the Department of Labor proposed its first major update of the Family and Medical Leave Act's (FMLA) regulations in effect since 1995. The long-awaited changes largely avoid dealing with more problematic aspects of FMLA and instead focus on clarifying a number of the existing regulations.

Background

Since taking effect in 1993, the federal Family and Medical Leave Act (FMLA) has required employers to provide eligible employees up to 12 weeks of unpaid job-protected leave for their own serious illnesses, for the birth or adoption of a child, or to care for family members with serious health conditions. Earlier this year, President Bush signed into law the first expansion of FMLA since its passage nearly 15 years ago, adding two new military family leaves. (See our January 31, 2008 *For Your Information*.) On February 12, the DOL unveiled proposed changes to its FMLA regulations, which take into account the DOL's experience in enforcing FMLA, public comments received in response to its December 2006 Request for Information, and U.S. Supreme Court and lower court decisions invalidating portions of its regulations. FMLA's new military family leave provisions are discussed but regulations governing them are not proposed.

The Proposed Regulations

The DOL has put forward a number of modest adjustments and clarifications to the existing regulations, but has not offered the major changes sought by employers. By expanding explanations and reorganizing existing provisions, the proposed regulations remove some regulatory ambiguity and, if finalized, may provide some clarity as employers seek to better manage their employees' FMLA use. However, the proposed changes will provide only limited assistance to employers in tackling their most difficult issues, including what constitutes a serious health condition and how to deal effectively with unscheduled, intermittent leaves.

Although the proposed regulations do not provide guidance on employers' obligations under the new FMLA military leave provisions, the DOL has provided insight into how it would interpret some of these provisions. The DOL has also posed a series of related questions for public comment on issues requiring further clarification, including medical certifications, calculating the single 12-month period during which leave to care for an injured service member may be taken, and the definitions of "next of kin," "son or daughter," and "exigency." Once comments are received, the DOL anticipates proceeding directly to the issuance of final regulations for the military leave provisions.

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Defining Serious Health Condition

Although employers sought relief from the broad definition of "serious health condition" that seemingly encompasses relatively minor illnesses, the DOL failed to provide meaningful change. The DOL has proposed two relatively modest clarifications to help employers determine whether an employee has a sufficiently serious health condition to trigger FMLA protection.

A physical or mental illness or injury that involves "continuing treatment" by a health care provider could constitute a serious health condition when there have been more than three calendar days of incapacity and two or more visits to a health care provider. Unlike existing regulations which have an open-ended time frame, the proposed regulations would require the two doctor visits to occur within 30 days of the beginning of the incapacity, unless extenuating circumstances exist.

Under the proposed regulations, employees claiming FMLA leave for a chronic health condition would be required to show they have seen their health care provider for that condition at least twice a year. Currently, employees must only demonstrate "periodic" doctor visits, with no timeframe specified.

Using Intermittent Leave

To reduce administrative burdens and the difficulties in covering short absences, many employers asked the DOL to increase the minimum increment for unscheduled, intermittent leave. The DOL was not persuaded to do so, but did offer a modest change. Under the proposed regulations, an employee would be required to make a "reasonable effort" (rather than an "attempt") not to disrupt operations by taking leave intermittently, but would still be permitted to take leave in the smallest increments permitted by the employer's timekeeping system.

The DOL has also proposed a useful clarification as to whether overtime hours that cannot be worked due to a FMLA qualifying reason (e.g., work limited to 40 hours per week by health care provider) would constitute leave. Under the proposed regulations, required overtime not worked would be counted against an employee's FMLA entitlement.

Substituting Paid Leave for Unpaid Leave

Under existing regulations, the employer is not required to provide paid sick leave in any situation in which the employer would not normally provide paid leave. The proposed regulations clarify that the same requirement would apply to the substitution of any form of accrued paid leave for unpaid FMLA leave. Thus, employees would be permitted to substitute accrued vacation or personal leave, or paid time off for unpaid FMLA leave only if the terms and conditions of the employer's paid leave policy are satisfied. For example, if the employer's policy requires vacation to be used in full-day increments, the employee could not substitute paid vacation for intermittent leave in smaller increments. Similarly, if the employer's policy requires two days' notice to take paid personal time, the employee could not substitute the paid leave for FMLA leave without giving two days' notice. To take advantage of this provision, employers would have to inform employees on paid leave restrictions in

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writing and notify them that unpaid FMLA leave may be taken if the employer's conditions for paid leave are not met.

Under existing regulations, FMLA's substitution provisions do not apply if an employee is receiving benefits under a disability plan. The proposed regulations would permit paid leave to also run concurrently with FMLA leave to supplement disability benefits if the employer and employee agree.

FMLA Eligibility

Generally, employers with 50 or more employees must offer FMLA leave to employees with 12 months of service who have worked at least 1,250 hours during the 12-month period immediately preceding the leave.

Consecutive or Continuous Employment Not Required. Under existing and proposed regulations, the required 12 months of service need not be consecutive. The proposed regulations establish that employment prior to a continuous break in service of at least five years could be disregarded in determining whether the employment threshold has been met except in the following circumstances. Prior employment must be recognized if the break was required by military service or was an approved absence (e.g., educational leave) governed by a collective bargaining or other written agreement with a rehire provision.

The proposed regulations incorporate the protections and benefits offered by the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) and clarify that a service break due to an employee's military service must also be taken into account when determining whether an employee meets the hours worked threshold for FMLA eligibility. Thus, hours that an employee would have worked but for military service are credited toward the required 1,250 hours worked and time in the military must also be counted toward the 12-month employment requirement.

> ***BUCK COMMENT.*** *The proposed regulations would not change FMLA's current 3-year recordkeeping requirements, and employers must continue to retain records to confirm prior employment within that period. However, the burden to prove employment predating employer records will be on those employees claiming FMLA eligibility based on such service.*

Counting FMLA Leave

Overtime. As noted above, the proposed regulations clarify that employees with proper medical certification may use FMLA leave in lieu of working required overtime and that scheduled overtime hours not worked due to a qualifying FMLA leave may be counted against the employee's 12-week entitlement. Where the employee works a part-time or reduced schedule, leave used in any week would be proportionate to the employee's scheduled hours in that week.

Holidays. Under the existing and proposed regulations, scheduled holidays are counted against an employee's 12-week entitlement when the employee is out for a full week. The proposed regulations clarify that a different rule applies when the leave is for less than a week. If the employee needs less than a week's FMLA leave and

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the holiday falls within the partial week of leave, hours not worked on the holiday would be counted against the entitlement only if the employee would otherwise have been required to work on that day.

Light Duty. Unlike current rules, the proposed regulations clarify that time on light duty assignment following a return from FMLA-qualifying leave would not be counted toward the employee's 12-week medical leave allotment. The proposed regulations would also amend job restoration rules so that reinstatement rights are not diminished by a light duty assignment.

When Eligibility Occurs After Leave Begins. Currently, determinations of FMLA eligibility must be made as of the date leave begins. The DOL has now proposed some flexibility when an employee who has satisfied the 1,250 hours worked threshold but not the 12-month service requirement takes leave. The proposed regulations clarify that when FMLA eligibility is reached while an employee is on leave, only the leave taken after reaching the service threshold would qualify as FMLA leave.

Employer Notice Obligations

The DOL's most wide-ranging changes apply to the employer notice requirements and would impose additional burdens on employers. Under the proposed framework, employers must provide employees with three types of notices – i.e., a general notice informing employees of FMLA rights, an eligibility notice to inform employees of the availability of FMLA leave following a leave request, and a designation notice to inform employees whether leave is being designated as FMLA leave.

General Notice – Posting and Distribution Requirements. Under current and proposed regulations, an employer must post a notice explaining FMLA's provisions and providing information for filing an FMLA claim. The proposed regulations would permit electronic posting as long as it satisfies certain information and accessibility requirements. Failure to post the required notice would subject the employer to a penalty of up to $110 per offense.

Under existing regulations, an employer who maintains an employee handbook must provide a general notice of FMLA rights and responsibilities in it while an employer that does not have a handbook must only provide specific written guidance to employees in connection with an FMLA leave request. Significantly, the proposed regulations would require distribution of a general notice to all employees by either including it in an employee handbook or by distributing a copy to each employee at least once a year, electronically or in hard copy format. The DOL has proposed a prototype general notice that may be used to satisfy both the posting and general notice requirement.

Eligibility Notice Requirements. The DOL has proposed modifications to the timing and content of this notice. The proposed regulations would require the employer to provide the eligibility notice within five business days (previously two business days) from the date of the employee's FMLA leave request or date of qualifying condition. The notice must confirm that the employee is or is not eligible for FMLA leave, and whether the employee has or does not have any remaining FMLA entitlement in the applicable 12-month period. It must also notify the employee of the right to substitute paid leave or to take unpaid FMLA leave if paid leave cannot be substituted under the employer's policies. The DOL proposes that employers include a statement of essential job functions with this notice if they will have to be addressed in a subsequent fitness-for-duty certification. The DOL

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has also proposed a prototype eligibility notice, which includes an employer check-off section to request medical certification or other documentation needed to determine whether the absence qualifies as FMLA leave.

Designation Notice Requirements. As with the eligibility notice, the DOL has proposed extending the time for an employer to notify the employee that leave is designated as FMLA leave from two to five business days. The proposed notice also requires the employer to inform the employee of the amount of time that will be designated as FMLA leave (e.g., hours, days or weeks) and whether paid leave will be substituted for unpaid FMLA leave. Where the amount of qualifying FMLA leave cannot be designated up front (e.g., unforeseeable intermittent leave for a chronic condition), an employer must inform the employee every 30 days of the amount of leave that has been designated as FMLA leave taken during that period.

The proposed regulations would also require the notice to inform the employee if the leave is not designated as FMLA leave due to insufficient information or a non-qualifying reason. In such circumstances, the employer must return the form to the employee, specify in writing the information that is lacking and give the employee seven calendar days to supply it. The DOL has proposed a prototype designation notice, which reflects these changes.

Responsibility to Designate Leave. Currently, employers cannot retroactively designate leave as FMLA leave except in very limited circumstances, such as when non-FMLA leave becomes FMLA qualifying or when an employee first notifies the employer upon return to work from a short absence. As a result, employees who are ineligible for FMLA leave may be deemed eligible where the employer fails to maintain records needed to establish the employee's eligibility or fails to provide the employee with timely notice that a qualifying absence is being charged against the FMLA leave entitlement.

The proposed regulations clarify that it is the employer's responsibility to designate leave as FMLA leave and that an employer may unilaterally designate absences as FMLA leave when the employee fails to provide needed paperwork. The proposed regulations incorporate the Supreme Court's decision in *Ragsdale v. Wolverine World Wide, Inc.* and acknowledge that employers may retroactively designate or count time absent from work as FMLA leave, as long as it does not harm or injure the employee. The retroactive designation of an absence as FMLA covered would also be allowed by agreement of the parties.

Employee Notice Obligations

Providing Sufficient Notice. Employees must generally provide at least 30 days' advance notice of foreseeable leaves to their employers and, if not foreseeable, notice as soon as practicable. Under existing regulations, the DOL has interpreted "as soon as practicable" to mean within two business days from when the need for an unforeseeable leave becomes known, even when the employee could have given notice sooner. The proposed regulations would require notice to the employer on the same or next business day if an employee learns of the need for FMLA leave less than 30 days in advance. An employee would also be required to respond to an employer's request for an explanation of why less than 30 days notice was given. Even for unforeseeable leaves, the DOL would generally expect employees to provide notice no later than the start of their shift.

Providing Sufficient Information. The proposed regulations clarify that an employee simply calling in sick would not trigger an employer's FMLA obligations. Rather, employees would have to provide sufficient notice to

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the employer of the need for FMLA leave, including the employee's inability to perform his or her job functions (or that a covered family member cannot participate in regular daily activities), the expected length of the absence and whether the employee (or family member) intends to see a health care provider or is under continuing medical care.

Following Employer Call-In Procedures. The proposed regulations would generally require employees to follow the employer's usual call-in procedures to secure FMLA-covered leave in both foreseeable and unforeseeable leave situations, ending the current practice which allows employees to take leave first and designate it as FMLA leave later. Consistent with their practices, employers could require employees seeking covered leave to call a designated number or contact a specific individual to request leave. Except in emergency situations, failure to follow established call-in procedures or properly notify employers of absences could cause a delay or denial of FMLA leave.

Medical Certification Requirements

Employees now seeking FMLA-protected leave must show that their absences are to due a qualifying reason, including their own serious health condition or that of a qualifying family member. The DOL's proposed regulations would provide some clarification as to how and when employers may require medical certification to substantiate an employee's request for leave.

Expansion of Time to Request Certification. The DOL has proposed extending the time employers have to request an employee's medical certification from two business days to five business days after the employee gives notice of the need for leave (or within 5 days of the commencement of an unforeseeable leave).

Contacting Health Care Providers. Currently, the employer's health care provider may contact the employee's health care provider with questions about an FMLA medical certification, but direct contact between the employer and the employee's health care provider is generally prohibited. The proposed regulations would relax this prohibition and allow an employer to directly contact an employee's health care provider (including "physician assistants") to authenticate and clarify the employee's medical certification, as long as the medical privacy requirements of the Health Insurance Portability and Accountability Act (HIPAA) are met (e.g., providing authorization). Further, the proposed regulations would permit the employer to deny FMLA leave for failing to provide proper certification if an employee does not authorize the health care provider to speak with the employer.

Although the DOL would generally limit employer inquiries to the information required by the new FMLA certification form, employers may request additional information if needed to determine eligibility for worker's compensation or disability benefits or to assess requests for accommodation under the Americans with Disabilities Act (ADA). Where the employee's serious health condition may also be a disability under the ADA, the proposed regulations clarify that employers may follow the procedures under the ADA to secure medical information.

Frequency of Certification or Recertification. The proposed regulations further clarify how often an employer may require medical certification of an employee's serious health condition and the time period for recertification. Generally, the proposed regulations would permit an employer to request recertification no more frequently than

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every 30 days. If the initial certification specifies a minimum duration of incapacity of more than 30 days, recertification may not be required until that time has passed unless circumstances (e.g., duration or frequency of leave, complications) change significantly, or the employer has reason to question the employee's reason for leave or the continued validity of the certification. For longer periods of incapacity (including certifications for a "lifetime" or "unknown" duration), the proposed regulations would allow the employer to require recertification every six months. For conditions lasting more than one year, employers may require a new initial certification each leave year, and could require the employee to obtain a second opinion at the employer's expense if the certification is doubtful or a third opinion if the initial and second opinions differ.

New Certification Form. The DOL has proposed a new certification form providing guidance as to medical facts needed to find a serious medical condition. The form seeks information from the health care provider on attendant symptoms, doctor visits, and medical treatment regimen. The revised form would allow – but would not require – the health care provider to provide a diagnosis, which current regulations do not permit. The proposed regulations would also require the employee's health care provider to certify the medical necessity of intermittent leave or a reduced work schedule.

Fitness-for-Duty Certification. The proposed regulations would make two significant changes to the fitness-for-duty certification process. An employer could require an employee to provide a certification from his or her health care provider before returning to work when the employee takes intermittent leave and reasonable safety concerns exist. The employer could also require that a certification address the employee's ability to perform the essential job functions. An employee who fails to provide a properly requested fitness-for-duty certification or a new medical certification at the end of an FMLA leave for the employee's own health condition could be denied reinstatement.

Attendance Awards and Bonuses

Under existing regulations, employee awards or bonuses based solely on attendance cannot be denied because the employee has taken FMLA leave. The proposed regulations would, however, allow bonuses to be based on achieving specified goals, such as hours worked or perfect attendance. In such circumstances, employees may be disqualified where the goal is not met as a result of an FMLA absence, as long as employees on non-FMLA leaves are treated in the same manner.

Continuation of Health Benefits and Payment of Premiums

The DOL's proposal would clarify employer obligations if an employee fails to pay for continued health coverage during FMLA leave and the employer allows the employee's health insurance to lapse for nonpayment of premiums. In such circumstances, the employer would still have a duty to reinstate coverage upon the employee's return to work and could be liable if it fails to do so.

The proposed regulations would also amend current regulations on the continuation of health benefits for an employee receiving workers' compensation payments. The proposal would require employees to make arrangements with their employers for continued coverage, whether or not a concurrent FMLA leave is paid.

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Waiver of FMLA Rights

Although FMLA prohibits employees from waiving their statutory rights, existing regulations are unclear as to whether the prohibition applies to past or future FMLA claims against the employer. The proposed regulations provide welcome clarification that employers and employees may settle past claims without prior court or DOL approval. However, the waiver of prospective FMLA rights would continue to be prohibited.

> ***BUCK COMMENT.*** *The U.S. Court of Appeals for the Fourth Circuit in Taylor v. Progress Energy, Inc. held a contrary view, prohibiting both prospective and retroactive employee releases of FMLA rights without prior DOL or court approval. That decision has been appealed to the U.S. Supreme Court, and it remains to be seen whether the DOL's position will be upheld.*

Effective Date

The DOL has not proposed an effective date, but has requested comments on the proposed regulations to be submitted by April 11, 2008.

Conclusion

Employers should begin to review their leave policies, practices and procedures to prepare for the final regulations and to anticipate changes the DOL is likely to put forward in connection with the new military leave provisions. Employee handbooks, communications and other plan documentation may need to be updated and forms revised. Buck's consultants would be pleased to assist you in meeting new federal requirements as well as those under state and local leave laws.

This FYI is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.

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