

Department of Labor Issues New Proposed Regulations Interpreting FMLA

Legal Alert
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Garvey Schubert Barer Legal Update, February 11, 2008.

On February 11, 2008, the Department of Labor (DOL) published a proposal to revise regulations interpreting the Family and Medical Leave Act (FMLA). These regulations have long been in the works and are offered in an attempt to clarify the various court decisions that over the years have reached different conclusions about how FMLA should be interpreted. What the proposed regulations do not offer is guidance on the new Servicemember Leave provisions signed into law on January 28, 2008.

Some of the highlights of the proposed regulations include:

Clarification of some definitions, including eligibility requirements for employees who are jointly employed;

Allowing employers the ability to deny bonuses (even perfect attendance or work hours related) to employees who don't qualify because they didn't meet the requirements as a result of taking FMLA leave, so long as non-FMLA leaves are treated the same;

Modify the definition of Serious Health Condition by stating that "continuing treatment" of a serious health condition means that which requires incapacity (three days or more) and two on-going treatments. The two treatments must occur within a 30 day calendar period. Also, if the serious health condition involves incapacity as the result of a chronic condition, the employee must see a physician at least two times a year for that chronic condition;

An employee taking intermittent leave would be required to comply with the employer's call-in procedures before taking unscheduled intermittent leave, except in defined "emergency" cases. No longer would the employees be able to take the leave and then qualify it as FMLA leave within two days of the absence (unless it was an emergency) as is allowed under the current regulations;

Employers would be able to contact medical providers directly to obtain authentication of documentation or clarification of the returned documents. There would still need to be a signed HIPAA authorization on file;

Employers would be required to inform employees why the employer was considering the documentation to be incomplete or insufficient, and allow the employee seven days to fix the problem;

Employers would be able to request recertification every six months, instead of once a year. Additionally, the fitness for duty certification would be more rigorous;

Employers would be required to provide annual notice of FMLA rights and responsibilities to all employees at least annually. Employers would also have five days (as opposed to the current two days) to provide an employee with notice of eligibility and a designation notice. Employees would be required to comply with the usual call-in procedures when the need for leave is unforeseeable.

The DOL is making some organizational changes to make regulations more user-friendly by keeping topic-specific regulations, such as leave for pregnancy and birth issues, all in one place rather than scattered throughout several sections.

The DOL is taking comments on the regulations for 60 days from the date of publication (February 11, 2008), at which time the regulations will be finalized.