

## ***FMLA NOTICE OF PROPOSED RULEMAKING***

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On February 11, 2008 the DOL issued a Notice of Proposed Rulemaking which will update the regulations that govern FMLA. We have until April 11, 2008 to submit our comments. Please note that there are many areas in which the DOL is calling for comments. The decisions regarding these open questions have not been made yet. Make yourselves heard!

Those of us who attended the SHRM Employment Law & Legislative Conference in Washington, DC heard the Assistant Secretary of Labor for Employment Standards, Victoria Lipnic, clarify the reasoning behind the proposed regulations. This is a brief summary and is not intended to be complete.

### ***SERIOUS HEALTH CONDITION:***

The proposed regulations do not change the definition of a “serious health condition”. The DOL declined to draft a list of non-qualifying conditions. It was felt that such a list might be too limiting. For example, most people who come into contact with poison oak merely get a rash. To exclude that would preclude the individual with a severe allergic reaction from protection under the law. Secretary Lipnic indicated that the DOL would defer to Congress to further define a “serious health condition.”

The rules clarify that a health care provider needs to be seen twice within a 30 day period or once plus a regimen of continuing treatment (which includes prescribing medication) rather than just two or more times or once plus a regimen of continuing treatment with no time frame specified as it is under the current rules. The DOL is seeking comment on this proposed change and whether the 30 day rule should also apply to the regimen of continuing treatment.

For chronic conditions requiring periodic treatment, the visits must take place at least twice a year. The current rule requires “periodic visits” to a health care provider but does not specify how many visits or how frequently they need to occur. The proposed change does not require that the visits occur at certain intervals, so both visits could occur in the same week. The DOL is seeking comment on the definition of “periodic”.

The proposed regulations clarify that male employees may take FMLA leave to attend the prenatal appointments of their spouses. They may also take leave if their pregnant spouses have severe morning sickness and are in need of their assistance for physical or psychological care.

### ***ELIGIBILITY:***

The proposed regulations address employee eligibility for FMLA protection. Under the current rules, an employee must have worked for the employer for 12 months. Those 12 months need not be consecutive. That meant that an employee could have worked for an employer for 5 months 12 years ago and meet the requirements after becoming re-employed after 7 months (and 1250 hours). The proposed rules state that separate stints of service will be counted so long as the break in service does not exceed 5 years. The DOL reasons that employers are not required to maintain payroll records beyond 3 years and the current rule can be burdensome. There are two exceptions to the five year limit: breaks in service resulting from an employee's fulfilling military obligations and breaks pursuant to an approved leave of absence, such as education or child rearing or as called for under a collective bargaining agreement.

The proposed regulations clarify that employees are eligible for 12 weeks of leave when they reach 12 months of service. Currently, many employers allow employees to take family or medical leave even if they fall short of the 12 months of service needed for FMLA protection. Employers who extend such leave to ineligible employees wanted to count the time on leave as part of the 12 weeks of leave required under FMLA if the employees reached their 12 months of service while on leave. The DOL has rejected this and states that in such cases, the individual employee would be entitled to their full 12 week FMLA leave upon becoming FMLA-eligible. Thus, the leave taken before the 12 month anniversary is non-FMLA leave and the leave taken after the anniversary is reached is FMLA leave, with the full 12 weeks now available to the employee.

*NOTICE:*

Employees must provide notice of at least 30 days when foreseeable or “as soon as practicable” when the need for leave is unforeseen. The DOL clarifies that it will usually be “practicable” for an employee to provide notice of the need for foreseeable intermittent (or other) leave either the same day (if employee becomes aware of the need for the leave during work hours) or the next business day (if the employee becomes aware of the need for leave after work hours).

With regard to unforeseeable intermittent (or other) leave, the DOL states that the employee is expected to give notice “promptly.” In the preamble to the regulations, the DOL states that it expects that an employee will ordinarily be able to provide such notice at least prior to the start of his or her shift. This eliminates the employees' ability under the old regulations to take up to 2 days after an absence begins to notify their employer that they intend to take FMLA leave. Furthermore, the employee must comply with the employer's procedures for calling out unless there are extraordinary circumstances.

Under the current rules, an employee must give sufficient notice, but need not mention FMLA. This would not change, but the DOL is seeking comment on whether the employee should mention FMLA, especially for subsequent FMLA time off.

Employers would have 5 business days to respond to a request for leave rather than the current 2 day notice period. The employer also has to provide written designation every 30 days thereafter if the exact amount of FMLA time cannot be initially determined (i.e.,

unscheduled intermittent leave). The DOL is seeking comment on the 5 day and 30 day rules.

The DOL is proposing a new Eligibility Notice, WH-381 and a new Designation Notice, WH-382. They are attached to the proposed regulations. Please review them as they contain many changes.

*CERTIFICATION:*

Employers would be allowed to contact the health care provider, without the employee's permission, to verify that a certification is authentic as long as the employee has been given the opportunity to cure any deficiencies first. The employer must provide the employee with specific information about the deficiencies.

Employers would also be allowed to ask for clarification from the health care provider, as long as all the protections of HIPAA were met. If the employee refuses to sign a HIPAA consent, then their FMLA rights may be jeopardized. This rule will also eliminate the expense and burden of companies having to retain their own doctors simply to ensure that a form is properly filled out. There is also a revised form WH-380.

Secretary Lipnic addressed the concern that a growing number of medical providers are charging to complete the certifications. She said that Congress only considered the employer and employee in enacting FMLA in 1993. They did not consider the medical provider. Thus, the DOL will not intervene and she suggested that the matter is one for Congress to consider.

Under current rules, if the certification is not returned within 15 days and the employee made a diligent, good faith effort to return it, they must be given an extension. There is no time stated. If there is not diligent, good faith effort or if the form is not returned after the extension, the employer may delay or deny leave. The proposed rules specify that the employer may deny leave if the form is not returned on time or by the extension date, if applicable. The DOL is seeking comment on whether a 7 day extension should be required if the form is not returned and whether the employer should be required to notify the employee that the form was not received.

The proposals clarify that recertifications may not be requested more frequently than 30 days (unless the employee requests an extension of their leave, circumstances have changed significantly, or the employer receives information that casts doubt on the validity of the original certification) and can only be requested in connection with an absence. If the minimum duration of the leave is more than 30 days on the initial certification, then employers must wait until that period expires before asking for a recertification.

In cases where the serious health condition is expected to last for a long or indefinite duration, an employer may request recertification every six months. An employer would be allowed to provide the health care provider with a record of the employee's absences and ask the provider to certify that the pattern is consistent with that serious health

condition. The DOL is seeking comments about the change in frequency of recertifications to 6 months. Second and third opinions are prohibited for recertifications. However, the DOL is also seeking comments on this given the change that restricts recertifications from every 30 days to 6 months.

*INTERMITTENT LEAVE:*

Employees taking intermittent leave must make a “reasonable effort” rather than an “attempt” to schedule foreseeable leave so as not to disrupt unduly the employer’s operations. The DOL is asking for more input on this topic.

Current regulations state that employers cannot require a fitness-for-duty certification when an employee returns from intermittent leave. The DOL recognized that there may be chronic conditions (such as severe hypertension that results in a loss of consciousness to a heavy equipment operator) that present serious safety concerns. Thus, the new regulations address this. Where reasonable job safety concerns exist, an employer may require a fitness-for-duty certification before an employee may return to work when the employee takes intermittent leave. The DOL is seeking input on the appropriate level of information an employer can obtain.

Leave may still be taken in the shortest period of time allowed by the payroll system, however. Under the current rules, employers cannot charge more FMLA time to the employee than is actually needed. The DOL is seeking comment on whether there should be an exception for “physical impossibility” that would allow an employer to charge an entire absence to FMLA leave where the time off actually needed for FMLA makes it physically impossible for the employee to work the remainder of the shift or work period if the employee is able to do so. For example, a flight attendant calls off a four day trip due to a migraine. Six hours later, the migraine clears and the flight attendant is available for work. However, a substitute was called in and the flight that begins the four day trip is gone.

Currently an employee may be transferred to another job only if FMLA leave is foreseeable and for planned medical treatment. The DOL has clarified that transfer to another job is not permitted for unforeseeable leaves such as unscheduled intermittent leave for chronic conditions. The DOL is seeking comment on this, however.

*OVERTIME:*

The DOL clarifies that missed overtime must be counted against the employee's FMLA leave entitlement if the employee would otherwise be required to report for duty but for the taking of FMLA leave. For example, if an employee has a serious health condition limiting the employee's work hours to 40 per week though he is scheduled for 48 hours in a week, the employee would be charged 8 hours, or 1/6th of a week, of FMLA leave.

*OTHER CHANGES:*

There are many other changes and clarifications contained within the regulations concerning light duty, perfect attendance awards, adding physicians assistants to the list

of health care providers, substitution of paid leave, inclusion of travel to a foreign country for adoptions, waiver of FMLA rights, designation of FMLA leave retroactively, service member related leave, annual notice requirements (the DOL is seeking comments on the frequency of required distribution of these notices) and more. It is important that you comment.

Furthermore, it is also important that you contact your members of Congress regarding the regulations. Senators Chris Dodd (D-CT) and Edward Kennedy (D-MA) expressed their concern that the proposed changes would discourage employees from exercising their right to take family and medical leave. Senator Dodd identified the proposals allowing employers to require employers to provide medical recertification every six months and allowing employers to contact the employee's health care provider directly as areas of particular concern.

Congress has several options available to address the proposed regulatory changes. Hearings before House and Senate Labor Committees were held on the proposed changes. Additionally, Senator Dodd has indicated that he intends to submit comments to the DOL regarding the proposed changes.

Another option available to Congress would be to attach a rider to an appropriations bill that would prevent funding for implementation of the proposed changes.

SHRM, on the other hand, supports the regulations because they would reduce some of the problems faced by HR professionals in complying with the law. SHRM believes that the regulations, while not complete, are reasonable.

You may access the Notice of Proposed Rulemaking as published in the Federal Register by following this link: <http://www.dol.gov/esa/whd/fmla/FedRegNPRM.pdf>

The following instructions for submitting comments have been provided by the DOL:

Commenters are encouraged to submit their comments electronically through the Federal eRulemaking Portal at <http://www.regulations.gov> until 12:00 midnight April 11, 2008. Once on the site, enter the key words "Family and Medical Leave Act" (include quotation marks) in the "COMMENT OR SUBMISSION" field to file a submission or view submitted comments. Follow the instructions for submitting comments. (Comments may also be submitted by mail as indicated in the Federal Register notice. Due to delays in mail processing, electronic submission is strongly recommended.) **Please be advised that comments received will be posted without change, including any personal information provided, and will be viewable by the public on the [www.regulations.gov](http://www.regulations.gov) Website.**

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