

Family and Medical Leave Act Summary of Notice of Proposed Rulemaking

As you may be aware the Department of Labor issued a notice of proposed rulemaking on February 11, 2008. The DOL is soliciting comments on the proposed rule until April 11, 2008. The proposal is more than a hundred pages long and touches on many aspects of the FMLA. The rule is likely to be finalized quickly – by the end of the year – in part because of the newly created military leave provisions, which require the Secretary of Labor to act before they become effective.

Much of the proposal makes minor changes to the existing regulations – renumbering the sections and making clarifications. The DOL said it did not have the authority to make some of the larger changes requested by IPMA-HR and other employer organizations. For example the definition of a “serious health condition” is largely unchanged as are the provisions relating to the use of intermittent leave.

Many of the more significant changes are in the employee and employer notice provisions as well as certifications and recertifications. The rules provide some needed clarity for employers. The entire proposed regulation is available on the DOL’s website <http://www.dol.gov/esa/whd/FMLANPRM.htm>: And an excellent summary is provided by the law firm of Proskauer Rose LLP and is available here: http://www.proskauer.com/news_publications/client_alerts/content/2008_02_11/res/id=PDF/15757-021108-DOL%20Issues%20Proposed%20Revised%20FMLA%20Regulations-ca-v3_Client%20Alert.pdf

Note that the regulations are not yet final and until they are you should continue using your current procedures and forms.

Below are some of the more important issues for IPMA-HR:

- Eligibility
 - In order for an employee to meet the eligibility requirements for a serious health condition followed by a course of treatment that involves two visits to a health care provider, the rules would clarify that the two visits must occur within 30 days of the beginning of the period of incapacity.
- Holidays
 - The rules would clarify when holidays count against the employee’s 12 weeks of FMLA leave – holidays would be treated as any other work day and counted against the amount of leave allowed if the employee is taking leave in full week increments. In all other cases, e.g. an employee takes off one or two days during the week, the holiday would not be considered FMLA leave and would not be counted against the number of FMLA days allowed.

- Bonuses
 - The proposed regulations would clarify that an employee who takes FMLA leave is not eligible for a perfect attendance award, or other bonus program such as a production bonus as long as other employees who take other types of leave – vacation, sick leave or maternity leave for example – are treated in the same manner.
- Intermittent Leave
 - No major changes here but proposes that employees who must take intermittent leave when medically necessary have a statutory obligation to make a “reasonable effort” not just an “attempt” to schedule the leave so as not to unduly disrupt the employer’s operation.
- Substitution of Paid Leave
 - Clarify that if an employee elects use the employer’s paid leave to run concurrently with all or part of the unpaid FMLA leave that the employee must comply with all of the employer’s paid leave policies. The employer must make the employee aware of any additional requirements for the use of paid leave and must inform the employee that s/he remains entitled to unpaid FMLA leave if s/he chooses not to meet the terms of the employer’s paid leave policies.
 - Allow public sector employees to elect or employers to require the use of accrued compensatory to run concurrently with the FMLA leave.
- Employee Waiver of Past FMLA Claims
 - DOL rejects the Fourth Circuit Court of Appeals ruling in *Taylor v. Progress Energy*, 493 F.3d 454 (2007) which held that an employer could not require an employee to sign a termination agreement that included a waiver of past FMLA claims. The DOL’s proposed rule allows for the waiver of past claims but maintains the prohibition on the waiver of prospective FMLA claims (e.g. by agreeing to give up FMLA rights in the future).
- Employer Notice Requirements
 - If an employee notice is not contained in a handbook it must be distributed annually regardless of employee requests
 - Consistent with the Supreme Court opinion in *Ragsdale v. Wolverine World Wide, Inc.*, an employer fails to designate any part of the leave as FMLA-qualifying will not be required to provide additional leave. But, DOL proposes additional language that allows an employee who can show individualized harm as a result of the employer’s failure to designate leave as FMLA-qualifying to receive remedies such as lost compensation or benefits.
 - Employers would be given five business days instead of two business days to convey eligibility notice - the five days begin to run from the time the employee either requests leave or the employer acquires knowledge that the employee’s leave may be for FMLA-qualifying reasons.
 - A proposed eligibility form is included as WH-381 which would include more details about the FMLA requirements – such as whether or not a fitness for duty certificate will be required upon return to work.

- Like the eligibility notice, employers would also be given five, instead of two, business days to notify an employee that the leave is FMLA-qualifying. DOL is proposing new form WH-382 that would include the more detailed requirements under the proposal.
- In the case of unforeseen intermittent leave usage the employer must inform the employee every 30 days as to whether or not the leave has been designated FMLA-qualifying if the employee took leave during that 30 day period.
- Employee Notice Requirements
 - If an employee fails to provide 30 days advance notice of the need for FMLA leave employers may require employees to explain why advance notice was not practicable.
 - If advance notice is not practicable the employee should provide notice either the same day or the next business day instead of the current language that says one or two business days.
 - An employee who requests FMLA leave need not use the term FMLA but must say that s/he is unable to perform the functions of the job, the anticipated duration of the leave, whether or not a visit to a health care provider is planned or if s/he has a condition and is receiving continuous treatment.
 - Employees must respond to employer requests for more information or risk losing FMLA protection
 - In the case of foreseeable leave, DOL proposes a change that would allow employers to require employees to follow the employer's normal notice and procedural requirements for requesting leave – absent unusual circumstances the employer could delay or deny FMLA leave.
 - In the case of unforeseeable leave, employers can also require employees to follow the employer's normal procedures for calling-in and absent extraordinary circumstances (such as the receipt of emergency medical care) the employer can discipline the employee in whatever way the employer's procedures call for and can delay FMLA coverage until the employee complies with the rules.
- Certification
 - Under the proposal employers would be given five instead of two days to request certification once it receives notice of the need for FMLA leave.
 - A certification would be considered incomplete if one or more of the entries have not been completed or if the information is vague, ambiguous or non-responsive.
 - In the case of an incomplete/insufficient certification an employer must state in writing what additional information is needed and provide seven calendar days for the employee to fix it, additional time must be given if the employee notifies the employer that s/he is unable to obtain additional information despite good faith effort. An employer can deny leave if the deficiencies are not corrected in the resubmitted certification.

- The proposal would allow employers to contact health care providers directly to authenticate and clarify certification forms instead of going through an employer's health care provider.
- The medical certification form would be revised and would require the specialization and fax number of the health care provider. The proposal also would allow (but not require) the health care provider to provide a diagnosis.
- A health care provider must certify that the intermittent or reduced schedule leave is medically necessary.
- Recertification for leaves covering an extended period of time may be requested every six months
- In the case of recertification employers may provide the health care provider with a record of the employee's absences and ask if the need for leave is consistent with the pattern.
- The proposal changes the fitness-for-duty certification procedures and allows an employer to require an employee's health care provider to certify that the employee can perform a list of the essential job duties IF that list of essential job duties is included with the employee eligibility notice the employer provides at the beginning of the leave.

In January, President Bush signed the National Defense Authorization Act (NDAA) that included two separate and important provisions expanding the FMLA. The Department of Labor has issued a notice that employers can post in the workplace describing the new leave provisions: <http://www.dol.gov/esa/whd/fmla/NDAAAmndmnts.pdf>

The first is a **new qualifying reason for leave** that does not become effective until the FMLA regulations are finalized – in the meantime employers are asked to cooperate with the intent of the law. The law states that **“eligible employees are entitled to up to 12 weeks of leave because of “any qualifying exigency” arising out of the fact that the spouse, son, daughter, or parent of the employee is on active duty, or has been notified of an impending call to active duty status, in support of a contingency operation.”**

The DOL is seeking input in the following areas:

- DOL seeks comments on the degree of nexus required to demonstrate that the exigency arises out of the servicemember's active duty status.
- Should “exigency” be defined as items of an urgent or one-time nature or should it be broader and include routine, everyday life occurrences?
- Should DOL create a list of pre-deployment, deployment and post-deployment exigencies? DOL expects that these exigencies will be non-medical related and will be for fairly routine activities such as making child care arrangements or financial/legal arrangements.

- Should the definition of son or daughter be broadened to include healthy adult children? Right now FMLA leave is only permitted for adult children who are otherwise incapable of self-care.
- Should the DOL make any changes to the provisions governing substitution of paid leave, intermittent and reduced schedule leave as it relates to this new provision?
- What type of documentation if any should be required to show that the leave is FMLA qualifying? Should the employee's statement be sufficient or a sworn affidavit?
- When should the employee be required to give notice of the need for leave?

The second is for a **New Leave Entitlement** which allows 26 weeks of caregiving leave. **“An eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember who is recovering from a serious illness or injury sustained in the line of duty on active duty is entitled to up to 26 weeks of leave in a single 12-month period to care for the servicemember.”**

DOL is soliciting comments on this section including;

- Should the definition of a spouse, son, daughter, parent, or next of kin of a covered servicemember be broadened to include a healthy son or daughter? Right now FMLA leave is only permitted for adult children who are otherwise incapable of self-care.
- How should next of kin be defined? The Department of Defense considers a list of eight potential “next of kin” for the disposition of remains/personal effects including unremarried spouses, children, parents, remarried surviving spouses (except in the case of divorce), blood or adoptive relatives who have been granted legal custody by court/statute, brothers/sisters, grandparents, other relatives of legal age in order of relationship according to civil law, and persons standing in loco parentis.
- State laws define next of kin in different ways, would it be appropriate to depend on state law?
- Can there be more than one next of kin and what if there are several close relatives who would all qualify?
- Should the servicemember be able to choose a next of kin, similar to the Department of Defense's “Committed and Designated Representative”
- Should a certification of next of kin be required?
- Should there be a time limit from the date of the illness/injury was sustained to the date a caregiver can take leave – e.g. in the case of long-term illness, could a covered employee take the 26 weeks of leave five, ten years after the servicemember sustained the illness/injury?
- Should the leave be permitted in cases where the injury/illness was sustained in the line of duty but does not manifest itself until after the servicemember has left the military?

- How should the DOL define “undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness.”
- DOL states its initial view that “undergoing medical treatment” means “any treatment, recuperation, or therapy provided to a servicemember for a serious injury or illness,” it is soliciting comments on whether there should be a requirement of temporal proximity between the covered servicemember’s injury or illness and the treatment, recuperation, or therapy. Alternatively, the DOL inquires whether it should rely on the Defense Department’s determination as to whether a servicemember is undergoing medical treatment, recuperation, or therapy for a serious illness or injury.
- How is the 12 month period of leave to be calculated? From the date of the service member’s illness/injury or from the date the servicemember is deemed to be ill/injured or from the date the employee first takes leave?
- Is there more than one 12 month period available – e.g. can a qualified employee take 26 weeks of leave each year or only once in the lifetime of the servicemember
- If an employee has an injured servicemember daughter and parent, or two injured servicemember children, could that employee take 26 weeks of leave for each injured servicemember or one 26 week period total?
- What types of certification should be required?
- What type of notice is required from the employee?