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Labor and Employment **ADVISORY**

New FMLA Regulations Take Effect

Major revisions to the regulations interpreting the Family and Medical Leave Act (FMLA) go into effect on January 16, 2009. The new regulations, issued by the Department of Labor (DOL) on November 17, 2008, are the first significant changes to the interpretation of the FMLA since it became law 15 years ago, and represent the culmination of a two-year effort by the DOL to seek input from the business and employee communities. While the new regulations do not provide the clarification and relief from administrative burdens that many employers had hoped for, there are important changes about which employers should be aware. Below is a summary of the most significant changes in the regulations.

Meaning of "Serious Health Condition" Clarified

One of the major struggles facing employers is how to apply and interpret the definition of the term "serious health condition" in determining whether an employee qualifies for FMLA leave. This is especially problematic when employers are faced with employees who have certain conditions like the common cold or the flu. Despite an outpouring of requests for clarification, little additional guidance is offered in the new regulations, and the six individual definitions of serious health condition are retained.

The new regulations do, however, clarify one of the definitions of "serious health condition" that requires more than three consecutive calendar days of incapacity plus two visits to a health care provider. Under the old regulations, an employee was not required to make the two visits within any particular time period. Because the old rule was open-ended, the Tenth Circuit held that the two visits to a health care provider must occur within the more-than-three-days period of incapacity. *Jones v. Denver Pub. Schs.*, 427 F.3d 1315, 1321 (10th Cir. 2005). The revised regulations reject suggestions by many employers that the Tenth Circuit holding be codified. The new regulations explain that a "serious health condition" results in incapacity for more than three full consecutive calendar days and necessitates in-person treatment from a health care provider two times *within 30 days* of the beginning of the period of incapacity. The first of these visits must be within seven days of the first day of incapacity. The DOL also stopped short of a bright-line rule by including an "extenuating circumstance" exception for situations where the employee experiences difficulty in scheduling the second appointment within the 30-day window. Under the new regulations, an employee may also establish a "serious health condition" by demonstrating a period of incapacity for more than three full consecutive calendar days and one in-person treatment by a health care provider that results in a regimen of continuing treatment under the

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supervision of the health care provider. This visit must also be within seven days of the first day of incapacity.

The new regulations further acknowledge the difficulty employers face in interpreting what is a “chronic serious health condition.” The DOL, however, declined to provide the drastic alterations many employers requested, such as eliminating the self-treatment provision. The new regulations do give meaning to a section of the old regulations, which provided that a chronic serious health condition “[r]equires periodic visits for treatment.” The new regulations define the term “periodic” as requiring at least two visits to a health care provider within a 12-month period.

Notice Requirements for Employers and Employees Changed

Perhaps the most sweeping changes in the regulations pertain to the employer notice requirements. The new regulations have been simplified through the consolidation of all employer notice requirements in one section. The notice forms are also changed in the new regulations. Under the previous regulations, there were two required notices: the FMLA poster (Form WH-1420) and the Employer Response form (Form WH-381). Under the new regulations, there are three employer notices. First, all covered employers are required to post and distribute a general notice of FMLA rights. The DOL has developed an updated “general notice” (Form WH-1420) to be used by employers for this purpose. Second, employers are now required to provide an eligibility notice to employees regarding their eligibility for FMLA leave within five business days of receiving a request for leave (instead of two days). The DOL has developed a new “eligibility notice” (Form WH-381) that can be provided to employees. Third, employers now have five business days (instead of two days) after receiving information sufficient to make a determination about whether the leave is FMLA qualifying to provide employees with a “designation notice.” The DOL has drafted a new Designation Notice form (Form WH-382) that employers may use.

Consistent with the U.S. Supreme Court’s decision in *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002), the new regulations also recognize that employers can make retroactive designations of leave as counting as FMLA leave; however, an employee may be able to establish an interference claim if the employer’s failure to timely designate leave causes harm or injury to the employee.

The DOL also tweaked the rules regarding employee notice requirements for foreseeable and unforeseeable FMLA leave. Although the DOL declined to require the employee to mention the FMLA by name, or to require written notice of the need for leave, the new regulations do require the following: (1) an indication that a condition renders the employee or family member unable to work, (2) the anticipated duration of the absence and (3) whether the employee or family member intends to visit a health care provider.

Settlement of Past Claims Explicitly Allowed

The new regulations clarify that retroactive waivers of FMLA rights are allowed under the Act, and only prohibit a prospective waiver of rights. In this regard, the DOL specifically rejected the Fourth Circuit Court of Appeals decision in *Taylor v. Progress Energy*, 493 F.3d 454 (4th Cir. 2007), in which the court held that an employer and an employee

may not independently settle claims under the FMLA without the approval of a court or the DOL.

Medical Certification Procedures Clarified

Under the old and new regulations, an employer may require that an employee's request for leave be supported by a certification issued by a health care provider. The new regulations offer additional guidance as to what facts should be included in the certification to support the need for leave. Specifically, the new regulations state that sufficient medical facts may include information about symptoms, diagnosis, hospitalization, doctors' visits, prescription medication, referrals for evaluation or treatment or any other regimen of continuing treatment. In addition, the new regulations clarify that providers may include information about the diagnosis of the patient's health condition, but that a diagnosis is not a required part of the certification form. The current Certification of Health Care Provider form has been replaced by two separate forms, one to be used for employees seeking FMLA leave for their own serious health condition (Form WH-380E), and another to be used for employees seeking FMLA leave to care for a family member with a serious health condition (Form WH-380F).

While the old regulations generally prohibited direct contact between employers and health care providers, the new regulations create an exception that permits employers to contact the employee's health care provider directly for purposes of authenticating and clarifying the medical certification, provided that the inquiry complies with the requirements of the Health Insurance Portability and Accountability Act (HIPAA). But, the new regulations make clear that employers *cannot* ask health care providers for additional information beyond that required by the certification form. The new regulations also specify who may contact an employee's health care provider on behalf of the employer: a health care provider, a human resources professional, a leave administrator or a management official. An employee's direct supervisor is expressly prohibited from contacting an employee's health care provider. The new regulations also instruct that the procedures for requesting medical information under the ADA must still be followed when an employee's serious health condition may also be a disability within the meaning of the ADA.

In addition, the new regulations clarify the applicable time period for recertification of the need for leave. Under the new regulations, as a general rule, employers will not be permitted to request recertification more frequently than every 30 days, unless circumstances have changed significantly or the employer receives information casting doubt on the continued validity of the certification. If the initial certification specifies a period of incapacity that is greater than 30 days, an employer may not request recertification until the initial period has passed. In all cases, however, an employer may request recertification at least every six months.

Fitness for Duty Certifications Modified

The new regulations replace the requirement that a fitness-for-duty certification must only be a "simple statement" with the original statutory standard requiring the employee to submit a certification from her health care provider stating that the employee is able to resume work. To further alleviate safety concerns, employers can provide the employee with a list of essential job duties and can require the employee's

health care provider to certify that the employee can perform them. In the intermittent leave context, the new regulations contain language that will permit employers to require employees to provide a fitness-for-duty certification every 30 days if an employee has used intermittent leave during that period and reasonable safety concerns exist.

Coverage Issues Clarified

To be eligible for FMLA protection, an employee must have worked for an employer for at least 12 months and must have worked at least 1,250 hours during that 12-month period. The DOL expounded on this requirement in the new regulations, attempting to appease both employer and employee groups. The new regulations explain that the 12-month period does not need to be continuous, but that employment prior to a continuous break in service of seven years or more need not be counted toward the 12 months.

The DOL also clarified which employers have responsibilities under the FMLA. Both the old and new regulations recognize that some employees may have “joint employers.” The new regulations clarify that a joint employer relationship generally does not arise from Professional Employment Organizations (PEOs). Specifically, a PEO will not be deemed to be a joint employer of a client’s employees if (1) the PEO contracts with an employer merely to perform administrative functions; (2) the PEO does not exercise control over the activities of the client’s employees; (3) the PEO does not have the right to hire/fire the client’s employees; and (4) the PEO does not benefit from the work performed by the client’s employees.

Requirements for Employer Bonus Programs Simplified

The new regulations offer welcomed change in the area of bonus programs. The new regulations seek to eliminate the confusing distinctions in the old regulations between attendance-based bonus programs and production-based programs. Under the new regulations, employees who take FMLA leave and thereafter fail to meet the requirements of bonuses that are based on achieving a specific goal, including hours worked, product sold or even perfect attendance, are not entitled to the bonuses. But, employers must treat FMLA leave and equivalent forms of leave the same for purposes of such bonuses.

Rules on Light Duty Clarified

The FMLA permits an employer and employee to agree to a “light duty” schedule that allows the employee to continue working rather than take unpaid FMLA leave. At least two courts have held that an employee exhausts his or her 12-week FMLA leave entitlement while performing work in a “light duty” assignment. See *Roberts v. Owens-Illinois, Inc.*, No. 02-CV-207-LJM-WGH, 2004 WL 1087355 (S.D. Ind. May 14, 2004); *Artis v. Palos Cmty. Hosp.*, No. 02C8855, 2004 WL 2125414 (N.D. Ill. Sep. 22, 2004). The new regulations reject these decisions and clarify that time spent performing “light duty” work does not count against an employee’s FMLA leave entitlement. The new regulations also change the rules so that reinstatement rights are not affected by a light duty assignment.

Significant Omissions in the New Regulations

Despite the numerous revisions to the regulations, the DOL failed to provide much-needed clarification in some very important areas. Most conspicuously, the new regulations offer little helpful guidance or changes regarding intermittent leave, despite acknowledging in its comments on the regulations that “[n]o issue received more substantive commentary.” The only significant change to the intermittent leave provisions is a clarification that employees must make a “reasonable effort” (as opposed to an “attempt”) to schedule leave so that it does not unduly disrupt an employer’s operation.

The DOL also declined several suggestions to alter the definition of the phrase “needed to care for” a family member with a serious health condition. Specifically, the new regulations do not include any requirement that “care” be limited to physical care only. Finally, the DOL declined several suggestions that the employee seeking leave must be the only available caregiver.

What This Means for Employers

While the DOL certainly did not make the changes many employers hoped and asked for, the new regulations do provide numerous changes in the way the FMLA is interpreted. Employers should review and revise company policies to ensure they comply with the new regulations. Employers should also make sure that the new forms contained in the new regulations are implemented. Finally, because of the numerous changes and because some changes conflict with court decisions, employers should be prepared for the possibility of an increase in litigation.

The American Recovery and Reinvestment Act of 2009: Possible Changes to COBRA

With a new presidential administration at the helm, there has been, and continues to be a push for a large economic stimulus package, which, among many other things, purports to amend COBRA. We, along with everyone else in the benefits world are closely monitoring the House and Senate, as they work to get this package on the president's desk to sign into law.

Recently the House of Representatives passed their version of this bill, which would: (1) provide for a 65% government-subsidy for COBRA Qualified Beneficiaries involuntarily terminated between September 1, 2008 and December 31, 2009; and (2) extend COBRA rights to employees over age 55 with 10 or more years of service by allowing them to remain covered until they enroll in another group health plan or become eligible for Medicare.

The Senate version of this bill is different and is currently being debated in open session. We expect deliberations to continue through the weekend, and they could continue for some time. The Senate could change the bill, the House and Senate together could amend the bill, or the bill may not pass at all. Congress has set a goal to have a finalized version of the bill, dubbed "American Recovery and Reinvestment Act of 2009," on President Obama's desk before the President's Day recess (scheduled February 16-20).

While we don't know what the final law will say, how it will affect COBRA, or how quickly we will get guidance from the Department of Labor on how to interpret and execute the amendments to COBRA, we feel comfortable saying that we do expect the government to *extend* COBRA rights to qualified beneficiaries in some capacity. This isn't good for employers, because it will increase claims experience on group health plans and drive up premiums. We will update you again as we get more information.