// LABOR & EMPLOYMINUTE

MOZLEY, FINLAYSON & LOGGINS LLP
ONE PREMIER PLAZA, SUITE 900
5605 GLENRIDGE DRIVE
ATLANTA, GEORGIA 30342
404.256.0700

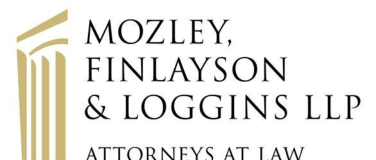
A NEW HORIZON ON THE SAME DAY: THE DEPARTMENT OF LABOR'S PROPOSED FMLA REGULATIONS

Since its enactment in 1993, the regulations implementing the Family and Medical Leave Act (FMLA), while providing some general guidance on one of the more expansive federal laws of the workplace, has left something to be desired. The FMLA contains a number of terms of art which define an employer's obligation to provide leave to covered employees. As most employers are aware, the FMLA generally provides for up to 12 weeks of unpaid leave to employees occasioned by a serious health condition faced by the employee or a member of their immediate family. FMLA leave also extends to childbirth and adoptions. Virtually every year since its enactment, Congress threatens/promises (depending upon your point of view) to further expand leave opportunities. Earlier this year, FMLA rights were extended to provide enhanced coverage to individuals returning from active military service. Under these new provisions, a spouse, son, daughter, parent, or next of kin, may take up to 26 work weeks of leave to care for a member of the armed forces (including members of the National Guard or Reserves) who is undergoing medical treatment, recuperation, or therapy, is otherwise receiving outpatient care or may be classified as temporarily disabled/retired resulting from a serious injury or illness. This move, signed into law on January 28, 2008, represents the first real change to the FMLA since its enactment.

However, further changes are on the horizon. On February 11, 2008, the U.S. Department of Labor (DOL) issued proposed regulations intended to clarify issues relating to the application of intermittent leave and reconcile existing regulations with the Supreme Court's 2002 decision in Ragsdale v. Wolverine Worldwide, Inc. (penalizing employers for their failure to comply with the specific employee notice provisions arising under the FMLA). The proposed regulations are open for public comment and will not become effective until April 11, 2008 (absent further modification by the DOL).

The proposed regulations are accompanied by an extensive report explaining the reasoning and intent of the changes. For those who have less than a few hours to spare, the more significant proposed changes to the FMLA can be summarized as follows:

Intermittent Leave. According to the DOL, the topic of unscheduled intermittent leave has received more substantive commentary than any other aspect of the FMLA. The proposed regulations, however, offer little substantive relief in the way of guidance to employers faced with interpreting intermittent leave obligations arising under the FMLA. The only apparent significant change to the intermittent leave provisions is a clarification that employees must make a "reasonable effort" to schedule their leave so that it does not unduly disrupt an employer's operations. Under the language of the existing regulations, employees are only required to "attempt" to schedule their leave in a manner that is not unduly disruptive. Thus, while it



is apparent that employees now are required to make some further effort to be mindful of the employer's business operations, there remains no bright-line test for when this obligation may be met. While inviting further comment on the issue, the DOL has thus far declined to permit employers to transfer or alter the duties of employees who may need unscheduled or unforeseeable intermittent leave. Similarly, the DOL declined to increase the minimum increment of intermittent leave that may be taken. Thus, employers are required to track intermittent leave in the shortest period of time that their payroll system uses in order to account for FMLA leave.

Employer Notice. Since its enactment, employers have been required to post a notice of general FMLA rights and responsibilities. Under the proposed regulations, however, employers will also be required, on an annual basis, to distribute a notice of FMLA rights to each employee. The proposed distribution of the annual notice can occur either through an employee handbook (if one exists) or through paper or electronic form, subject to certain conditions. The DOL has developed a prototype "general notice" that can be used to inform employees of their general rights under the FMLA. The DOL has also proposed an "eligibility notice" requiring employers to notify employees of their eligibility for FMLA leave within five (5) business days of receiving a request for leave. This is an expansion over the current regulations which require an employer to notify an employee that he or she is eligible for FMLA leave within two (2) days of receiving an employee request or learning that an employee is taking leave that may potentially qualify for FMLA protection. Additionally, the DOL has proposed a "designation notice" that requires employers to affirmatively notify employees that leave they are taking is designated as FMLA leave. This "designation notice" must be given to the employee within five (5) days after the employer receives information sufficient to make a determination as to FMLA coverage. In accordance with the Supreme Court's decision in Ragsdale v. Wolverine Worldwide, Inc., the proposed regulations recognize and allow for employers to make retroactive designations of leave. However, the door is open for an employee to establish an interference claim if he or she is prejudice by the employer's lack of timely notice that leave is being counted for FMLA purposes.

Employee Notice. The DOL has also proposed modifying the rules requiring employee notifications to the employer of the need for leave. When the need for leave is foreseeable, employees are still expected to provide at least 30 days notice to the employer. In those circumstances where the employee becomes aware of the need for leave less than 30 days in advance, the proposed regulations require that, in the absence of emergency circumstances, notice be given to the employer the day of the leave or the following day. Employees who fail to provide the preferred 30 days notice must respond to an employer's request for an explanation as to the delay in providing notice. The proposed regulations require employees to follow an employer's procedures for calling in absences and requesting leave, although the employee need not specifically recite or request "FMLA leave," when doing so. In the event of unforeseeable leave requests, the proposed regulations provide that, except in extraordinary circumstances, employees must provide notice to the employer no later than the start of the assigned work shift. Notably, an employee who merely "calls in sick" has not provided sufficient notice to trigger an employer's obligations under the FMLA.

Continuing Regimen of Care. While the proposed regulations do not make any attempt to better define a "serious health condition," the proposed regulations now place a time limit on the occurrence of two visits to a healthcare provider. The two visits must occur within 30 days from the beginning of the period of incapacity in order to trigger FMLA coverage.

Holidays. The DOL has stated in the proposed regulations that if an employee takes a full week of FMLA leave, that any holidays falling within that full week count against the 12 weeks of leave. However, if an employee needs less than a full week of FMLA leave and a holiday falls within the partial week of FMLA leave, then the holiday hours do not count against the 12 week entitlement unless the employee would otherwise have been required to report to work on the holiday.

Perfect Attendance. Employers who offer awards based upon perfect attendance do not have to extend such awards to employees who take unpaid leave under the FMLA.

Light Duty Work. Under the proposed regulations, employers are not permitted to count periods of light-duty work against the 12 week FMLA entitlement. Notably, this regulation is contrary to several court decisions stating that light-duty assignments can be counted against the 12 weeks of FMLA leave.

Medical Certifications. Employers continue to be able to require medical certification of an employee's need for leave. Under the proposed regulations, employers may request such certification within five (5) business days of being advised of the need for leave. If a medical certification form is incomplete or insufficient, employers must describe the deficiencies in writing and give the employee an additional seven (7) days to cure the deficiency. The DOL has developed a revised certification form (Form WH-380) for these purposes.

Contacting Healthcare Providers. The proposed regulations relieve some of the prohibitions against employers from contacting healthcare providers. Under the proposals, employers are permitted to contact the employee's healthcare provider directly for purposes of authenticating and clarifying a proposed medical certification, provided that the inquiry complies with HIPAA privacy protections. Significantly, employers do not need to obtain an employee's consent to initiate contact with the healthcare provider for these purposes.

Medical Recertification. The DOL has attempted to clarify its rules regarding how often employers can request recertification for the need for FMLA leave. Under the proposed regulations, employers are generally not 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 prior certification. In the event the initial certification specifies a period of incapacity that is greater than 30 days, then an employer is prohibited from requesting recertification until the initial period has expired. In all cases, however, including those where the initial certification is for an indefinite or lifetime period, the employer may request recertification every six (6) months.

Return to Work Certifications. Under the proposed regulations, the DOL will permit employers to require additional information on return to work certifications provided by the employee. The employer may require that the employee's healthcare provider certify that the employee is able to perform a list of essential job functions. In the context of intermittent leave, the DOL has proposed language that would allow employers to require employees to provide a fitness-for-duty certification every 30 days if the employee has used intermittent leave during that time period and a reasonable safety concern exists.

The proposed regulations offer some clarification of numerous vague and troublesome terms arising under the FMLA. While the DOL certainly could have gone farther to alleviate many forms of confusion, especially those doubts relating to intermittent leave, there are some areas where the clarification will be helpful to employers. The text of the proposed regulations (and the new forms) may be found through the Department of Labor's website at www.dol.gov.

****

MFL Labor and EmployMinute is a publication of the law firm of Mozley, Finlayson & Loggins LLP. The views expressed herein are not intended to constitute legal advice. Given that every situation provides different potential outcomes, specific questions should be directed to competent legal counsel. All rights reserved.

Mozley, Finlayson & Loggins LLP, was founded in 1977. The firm serves a broad-based and diverse client base in a variety of matters throughout the United States. Through its participation in the Law Firm Alliance, the firm maintains an international footprint. The firm remains focused on providing each client with the highest level of personalized service to assure satisfactory outcomes.

Mozley, Finlayson & Loggins' Labor and Employment Law attorneys counsel employers of all sizes in the many aspects of the employment process, from employee selection through termination. The Firm's labor and employment lawyers provide advice and representation relating to:

- Employment Discrimination Claims
- Preventive Labor Relations Practices
- Wrongful Discharge Litigation
- NLRB and Collective Bargaining Matters
- Workforce Changes Resulting From Dispositions and Acquisitions
- Wage and Hour Compliance
- OSHA and Workplace Safety Issues
- COBRA and ERISA Litigation
- Americans with Disabilities Act
- Trade Secrets/Restrictive Covenants
- Development of Employment Procedures and Policies

If we may be of assistance, please contact Christopher E. Parker at 404.256.0700 or cparker@mfllaw.com.