



NEW FMLA REGULATIONS PROPOSED



Jerry Pinn
"The proposed rule consolidates all the employer notice requirements into one section, and increases the notice requirements in order to better enable employees to understand their FMLA rights."

On February 11, 2008, the Department of Labor (DOL) published new proposed FMLA regulations, which are not final and are open to further comment through April 11, 2008. While not resolving all employer objections, the proposed regulations are interesting and at least generally discuss, and in some cases resolve, concerns expressed by employers.

Definition of a serious health condition - Many commentators urged the DOL to increase the required number of days of incapacity to qualify as a "serious health condition," or to simply adopt a work day rather than a calendar day standard. There was also discussion of the confusion in the "seriousness" aspects of the definition, particularly concerning matters such as the common cold. While noting the problems, the DOL concludes that it has not been able to construct an alternative regulatory definition better than the objective test of more than three calendar days incapacity plus treatment. They did make a modification to the treatment aspects as the current regulations define "continuous treatment" for purposes of establishing a serious health condition as a period of incapacity of more than three consecutive calendar days and treatment two or more times by a health care provider. A proposed clarification specifies that the two visits to a health care provider must take place within a thirty calendar-day period to meet the definition. Similarly, a chronic serious health condition is currently defined as one that requires periodic visits for treatment, and in the proposed regulations, "periodic visit" is defined as visiting a physician twice or more per year for the same condition. The DOL refused to alter the definition of chronic serious health conditions so that only chronic conditions perceived to be "serious" would be covered.

Intermittent or reduced scheduled leave - In addition to the definition of "serious health condition," perhaps the other main objection raised by employers with the current regulations, pertain to the "intermittent or reduced schedule leave" provisions, particularly the requirement that the employer allow such leave for as little as the employer's minimum time increment for pay purposes. Little change is made in the current provisions in this regard, although proposed Section 825.203 does clarify that an employee who takes intermittent leave when medically necessary has a statutory obligation to make a "reasonable effort" as opposed to an "attempt" to schedule leave so as to not disrupt unduly the employer's operations.

Perfect attendance awards - There had been much confusion as to whether employee incentive plans are in violation of the current regulation, which distinguishes between bonuses for job performance such as those based on production goals, and bonuses that contemplate the absence of occurrences, such as bonuses for working safely with no accidents or for perfect attendance. The proposed regulation provides that if a bonus or other payment is based on the achievement of a specified goal such as hours worked, products sold or perfect attendance, and the employee has not met the goal due to FMLA leave, then the payment may be denied, unless the bonus is otherwise paid to employees on an equivalent non-FMLA leave status.

Changes related to employees notifying their employers - Some significant improvements and clarification were made here. Comments were received about the existing rules, suggesting revisions to reduce the impact of unforeseeable intermittent leave and other uncertainty in the workplace. Under the new DOL proposal, an employee

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SUPREME COURT RULES ON EVIDENCE OF DISCRIMINATION AGAINST EMPLOYEES OTHER THAN PLAINTIFF



Howard Jackson

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..... it came from employees who are "similarly situated" to the plaintiff in that they had the same supervisors. Further, Sprint argued that the probative value of the evidence would be substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading of the jury, and undue delay.

The Supreme Court decided that the question of whether evidence of alleged discrimination by other supervisors is admissible is fact based and depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case. The Court stated that the issue required an "on-the-spot balancing" by the trial judge, to determine how factually relevant the proposed evidence is, and how unduly prejudicial it would be if offered into evidence. The Court found that such rulings by a trial judge should be accepted unless the trial judge has abused his discretion.

In another development, the U.S. Supreme Court decided another case on February 27, 2008, Federal Express Corp. v. Holowecki. This case ruled that an "intake questionnaire" filled out by the plaintiff, and a detailed affidavit supporting her contention that the employer's programs discriminated against older workers, was sufficient to constitute a "charge" required by the statute to commence an administrative proceeding by the EEOC. The EEOC regulations define a charge as meaning a statement filed with the EEOC which alleges that the named employer has engaged in discrimination, and identifies the information a charge should contain, including: the employee's and employer's names, addresses, and phone numbers; an allegation that the employee was a victim of discrimination; the number of employees of the charged employer; and a statement indicating whether the charging party has initiated state proceedings. However, a concluding portion of the regulations indicates that a charge is "sufficient" if it is "in writing and . . . names the prospective respondent and . . . generally alleges the discriminatory act."

The Court found that the EEOC's determination that the filing was a charge was a reasonable exercise of its authority to apply its own regulations and procedures in the course of the routine administration of the statute it enforces. The fact

In Sprint/United Management Co. v. Mendelsohn, (February 26, 2008), the U.S. Supreme Court addressed an interesting question of whether evidence can be introduced at trial of alleged similar discrimination by supervisors of the defendant company who played no role in the adverse employment decision(s) challenged by the plaintiff. The plaintiff was terminated as part of an ongoing company-wide reduction in force, and sought to introduce

testimony by five other former Sprint employees who claimed that their supervisors had discriminated against them because of age. However, none of the five witnesses worked in the same department with the plaintiff, nor had any of them worked under the supervisors in the plaintiff's chain of command. The employer sought to exclude the testimony, arguing that it was irrelevant to the central issue in the case: whether the employer's decision-maker terminated the plaintiff because of her age. Sprint argued that such testimony would be relevant only if

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must provide notice as soon as practical, and must comply with the employer's usual procedures for calling in and requesting leave, except when extraordinary circumstances exist such as when the employee or covered family needs emergency medical treatment. Under the new proposed regulations, the DOL expects that it will be practical for the employee to provide notice of the need for leave either the same day (if the employee becomes aware of the need for leave during work hours) or the next business day (if the employee becomes aware of the need for leave after work hours). The proposed regulations contemplate that although an employee requesting leave need not assert his or her rights under the FMLA or even mention the FMLA to put the employer on notice of the need for FMLA leave, employees must nevertheless provide sufficient information to make an employer aware that FMLA rights may be at issue. The DOL clarifies that sufficient information must indicate that the employee is unable to perform the functions of the job, the anticipated duration of the absence, and whether the employee intends to visit a health care provider or is receiving continuous treatment. A provision is added that clarifies that calling in with a simple statement that the employee is "sick," without providing more information, will not be considered sufficient notice to trigger an employer's obligations under the Act in the case of unforeseeable leave. The proposed regulation continues to require employers to inquire further if they need additional information in order to obtain the necessary details about the leave.

An important provision would eliminate the current regulatory language stating that an employer cannot delay or deny FMLA leave if an employee fails to follow reasonable call-in procedures. Instead, employees would be required to follow established call-in procedures (except one that imposes a more stringent timing requirement than the regulations provide), and failure to properly notify employers of absences may cause a delay or denial of FMLA protections. The proposal clarifies the ramifications of failing to provide timely notice, including examples that if an employee could have provided two weeks notice of a doctor's appointment for treatment of a serious health condition, but instead provides only one week's notice of the appointment, the employer may delay FMLA-protected leave for one week. If the employee does not delay the taking of the leave, the absence will be unprotected and the employer can treat the absence in the same manner as any unexcused absence. Alternatively, the employer would have the option of accepting the employee's late notice and counting the leave against the employee's FMLA entitlement. However, the DOL retains current language that FMLA leave cannot be delayed due to lack of required notice if the employer has not complied with its notice requirements, which now would also include providing the general notice in an employee handbook or annual distribution.

Changes related to employer notification requirements – The proposed rule consolidates all the employer notice requirements into one section, and increases the notice requirements in order to better enable employees to understand their FMLA rights. One change deals with the information in the employer notice that communicates to employees their eligibility status for FMLA leave, and requires this information to be conveyed within five (rather than the current two) business days after the employee requests leave or the employer acquires knowledge that the employee's leave may be for an FMLA-qualifying reason. Further, the proposal has additional requirements that the employer notify the employee whether leave is still available in the applicable twelve-month period, and if the employee is not eligible or has no FMLA leave available, then the notice must indicate the reasons why the employee is not eligible or that the employee has no FMLA leave available. The proposal would require employers to inform their employees of the number of hours, days, or weeks, if possible, designated as FMLA leave. Where the amount of future leave that will be needed by an employee is unknown, the proposal requires that the notice of the amount of leave designated and counted be provided every thirty days, to the extent that the employee took leave for the condition in the prior thirty-day period. In effect, the proposed regulations do away with the concept of "provisional designation" under the current regulations, as the DOL concludes that the current regulations cause confusion and the proposed regulations recognize that employers may not be able to designate leave as FMLA covered until the employee provides additional information.

Penalties for failure to provide employer notice to employees - Certain portions of the current regulations have been called "categorical" penalties which generally require the employer to provide additional leave to an employee where the employer failed to provide proper notice to the employees of the leave status. The U.S. Supreme Court invalidated such penalty provisions, finding them inconsistent with the statutory entitlement of only twelve weeks of FMLA leave and contrary to the statute's remedial purpose. However, while the proposed rule removes these categorical penalty provisions, it does clarify that where an employee suffers individualized harm because the employer failed to follow the notification rules, the employer may be liable for damages due to such harm.

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Changes to medical certification forms – The proposed regulations would allow employers to request medical certification from the employee within five business days of receiving the employee's notice of the need for leave (currently two business days), and also propose that when an employer determines that a medical certification is incomplete or insufficient, the employer must state in writing what additional information is necessary and provide the employee with seven calendar days to cure the deficiency. There are also several revisions proposed to the medical certification form, to implement the statutory requirement for "sufficiency" of the medical certification. The proposal also allows employers to contact the employee's health care provider directly, rather than through a third-party health care provider that represents the employer, provided the contact between the provider and the employer complies with the privacy rule under HIPAA.

Further significant changes - Further changes clarify the eligibility requirement of being employed for twelve months by the employer; determine in the case of jointly employed employees whether fifty employees are employed within seventy-five miles; substitution of paid leave; the treatment of light duty; medical recertifications and certifications for fitness-for-duty; and waiver of FMLA rights.

Editor's Note - The proposed regulations do provide some better organization and clarification, and while they resolve some employer concerns, they do not resolve employer's two main complaints (i.e., the definition of a serious health condition and issues pertaining to chronic and intermittent leave). They impose additional requirements on the employee to furnish timely and appropriate notice to the employer of the need for FMLA leave, although they also increase the employers' burdens in providing notice to employees of their rights and responsibilities. Employers must remember that the proposed regulations are proposals only, and may not be followed until they become final regulations.

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that the claimant filed a formal charge with the EEOC later was deemed irrelevant, and the fact that the EEOC office receiving the intake questionnaire failed to treat the filing as a charge in the first instance was also not deemed determinative. The Court concluded as follows: "In addition to the information required by the regulations, i.e., an allegation and the name of the charged party, if a filing is to be deemed a charge it must be reasonably construed as a request for the agency to take remedial action to protect the employee's rights or otherwise settle a dispute between the employer and the employee."

Editor's Note - The determination of whether something filed with the EEOC is a "charge" is important, as in most states the charge must be filed within 300 days (180 days in some states) to be actionable, and there is a statutory period of 60 days after filing of the charge allowed for conciliation before litigation may commence. However, there is nothing particularly remarkable about the Federal Express ruling, and the EEOC has modified its intake questionnaire forms to make them more consistent with being sufficient to constitute a charge.

The Sprint case is probably of much greater significance, as in many litigation cases a plaintiff may want to introduce evidence of similar discrimination against others. Some people refer to such evidence as "me too" evidence. Employers obviously want to exclude such evidence, and often file motions prior to trial to get the trial judge to make an advance ruling on such issues. Employers also argue that the trial of a single claimant could turn into a "multi-claimant trial," if evidence of discrimination against others is introduced. The Supreme Court basically ruled that the trial judge must weigh the equities rather than apply a "per se" rule of automatic inclusion or exclusion, depending on how relevant the offered evidence is, and the potential unfairness to the employer of having to defend against such evidence.

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