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Briefly

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HOW TO COMPLY WITH THE NEW FMLA REGULATIONS

Jerry Pinn

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On January 16, 2009, new U.S. Department of Labor (DOL) Family & Medical Leave Act (FMLA) regulations go into effect. This paper will view the new regulations particularly as they mandate changes from the current regulations.

Clarifying the definition of "eligible employee" (Section 825.110) – To be eligible, an employee must have completed 12 months of continuous employment, and worked 1,250 hours in the prior 12-month period.. The final rule clarifies that although the 12 months of continuous employment need not be consecutive, employment prior to a continuous break in service of 7 years or more need not be counted.

Clarifying the definition of "serious health condition" (Section 825.115) -- The final rule makes a minor clarification that the test of more than three consecutive calendar days cannot be met by partial days. The word "full" is added to the test in the final rule (i.e., a period of incapacity of more than three consecutive "full" calendar days).

The previous regulation defines "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 healthcare provider. DOL has added requirements in Section 825.115(a)(1) specifying that the two visits to a healthcare provider must take place within 30 days. Further, the first visit to the healthcare provider must occur within 7 days of the first day of incapacity. In the previous regulations, a chronic serious health condition is defined as one that requires periodic visits for treatment, but the regulations did not define the term "periodic visit." In the final rule "periodic visit" is defined as having visited a healthcare provider at least twice a year for the same condition.

Minimum amount of FMLA leave allowed (Section 825.205) and effect of holidays occurring during leave (Section 825.200) – The final regulation makes clear that the employer must account for the intermittent or reduced scheduled leave under FMLA "using an increment no greater than the shortest period of time that the employer uses to account for use of other forms of leave provided it is not greater than one hour." Section 825.200 clarifies regarding how holidays are counted when they fall in a week that an employee needs less than a full week of FMLA leave. In such situations it is the DOL's position not to count the holidays against the employee's 12-week entitlement. The DOL clarified that work weeks and fractions thereof may be converted to hours for tracking purposes. The DOL changed the final rule for calculating an average work week when the employee has no normal schedule, to a 12-month rather than a 12-week average, to account for seasonal variation.

Substitution of paid leave (Section 825.207) – The final regulation requires FMLA leave-takers who are also receiving paid leave to meet their employer's uniformly-applied paid leave policies for accrued paid vacation and personal leave (this has always been the case for the substitution of paid sick leave). Section 825.207(a) requires that employers notify employees of any additional requirements for the use of paid leave, and DOL has clarified that this information must be included with the rights and responsibilities notice required under Section 825.300(c). This information may be

Continued on page 2

"NEW FMLA REGULATIONS" continued from page 1

included in the text of the rights and responsibilities notice itself, or the employer may attach a copy of the paid leave policy to the notice, or provide a cross-reference to a leave policy in an employee handbook or other source available to employees, where paid leave policies are customarily set forth.

Employer notification requirements (Section 825.300) – eligibility notice – There are essentially four notice requirements in the final rule – the general notice, the eligibility notice, the rights and responsibilities notice, and the designation notice. Section 825.300(c)(1) of the final rule requires employers to provide the rights and responsibilities notice to employees at the same time that they provide the eligibility notice. The employer is permitted to provide an employee with both the eligibility and designation notice at the same time in cases where the employer has adequate information to designate leave as FMLA leave when the employee requests a leave.

Regarding the general notice, employers may meet the general notice requirements by either duplicating the prototype general notice in Appendix C or by using another format so long as the information provided, at a minimum, includes all of the information contained in the prototype general notice. The final rule requires the employer to provide the general notice to new employees upon being hired, and if the employer has employee handbooks or other materials concerning benefits and leave, such written materials must include the general notice information.

Regarding the eligibility notice and rights and responsibilities notice, Section 825.300(b)(1) requires an employer to advise an employee or his or her eligibility status within five business days (changed from two) of the employee's request for leave, or the employer acquiring knowledge that the leave may be for an FMLA-qualifying reason. The final rule in Section 825.300(b)(2) requires that if an employee is not eligible for FMLA leave, the employer's notice to the employee must state at least one reason why the employee is not eligible. If the employee is determined to be eligible, the employer is required to provide the employee with specific notice of his or her rights and obligations under the law and the consequences of failing to meet those obligations, and the eligibility notice should be accompanied by any required medical certification forms. An optional prototype eligibility notice is included as Appendix D. The eligibility notice covers the employee who has worked 1,250 hours of service in the immediately preceding 12 months and whether 50 or more employees are employed at the same location.

Regarding the designation notice, Section 825.300(d)(1) requires that an employer notify the employee within five business days (a change from the current requirement of two business days) that the leave is designated as FMLA leave once the employer has sufficient information to make such a determination. The section requires the employer to notify the employee if the leave if not designated as FMLA leave and the reason the leave was not designated. The final rule expressly requires the employer to inform the employee the number of hours, days or weeks that would be designated as FMLA leave. If it is not possible to provide the hours, days or weeks that will be counted against the employee's FMLA leave entitlement (such as an occasion of unforeseeable intermittent leave), then the amount of leave counted against the employee's FMLA leave entitlement must be provided upon request by the employee, but then only once every 30 days and only if the employee has

Continued on page 3

MARY DEE ALLEN BECOMES MEMBER OF FIRM

CONGRATULATIONS are in order for Mary Dee Allen who became a Member of Wimberly Lawson Seale Wright & Daves, PLLC effective January 1, 2009. She has served as a Senior Associate in WLSWD's Morristown and Cookeville offices since 2003.

Mary Dee is a practicing trial attorney since 1992, handling primarily workers' compensation defense and employment discrimination defense, in state and federal Courts and administrative agencies. She obtained an Associates Degree in Nursing from Union University in 1988, a Bachelor's Degree in History from Union University in 1989, and a Doctor of Jurisprudence Degree from the University of Memphis in 1992.

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"NEW FMLA REGULATIONS" continued from page 2

taken FMLA leave. If the employer requires that paid leave be substituted for unpaid leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, the employer must inform the employee of this designation at the time the leave is designated as FMLA leave. The DOL has included a new Section 825.300(d)(3) to require the employer provide written notice of any requirement for a fitness-for-duty certification, including indicating whether the fitness-for-duty certification must address the employee's ability to perform the essential functions of the employee's position, and, if so, to provide a list of the essential functions of the employer's position, with the designation notice.

There is a new optional prototype designation notice in Appendix E. The new Section 825.300(d)(5) requires employers to notify employees if the information in the designation notice changes. For example, if an employee exhausts his or her FMLA leave entitlement and the leave will no longer be designated as FMLA leave, the employer must provide the employee with written notice of this change within five business days of receipt of the employee's first notice of need for leave subsequent to any change.

Consequences of the employer failing to provide appropriate notice (Section 825.300(e)) – The final regulations make clear that if there is any violation of the general, eligibility, or designation notice requirements, and if the employee is able to demonstrate harm as a result of the employer's failure to provide a required notice, the employer could be liable for damages for the harm suffered as a result of the violation.

Changes related to employees notifying their employers (Sections 825.301, 302, 303, and 304) – Regarding employee notice requirements for foreseeable FMLA leave, Section 825.302 retains the requirement that an employee must give at least 30 days' notice when the need for FMLA leave is foreseeable at least 30 days in advance, and the requirement that notice be provided as soon as practical if the leave is foreseeable but 30 days' notice is not practicable. A provision is added that when an employee gives less than 30 days' advance notice, the employee must respond to a request from the employer to explain why it was not practicable to give 30 days' notice. Section 825.302(d) adds that the employee must comply with the employer's usual notice and procedural requirements for calling in absences and requesting leave, absent unusual circumstances, deleting the previous provision that the employer could not deny such leave if an employee fails to follow such procedures. The final rule states that where an employee becomes aware of a need for FMLA leave less than 30 days in advance, it should be practicable for the employee to provide notice of the need for leave either the same day or the next business day.

When the employee provides notice, there is clarifying language that the employee must provide sufficient notice that indicates that a condition renders the employee unable to perform the functions of the job, or if the leave is for a family member, that the condition renders the family member unable to perform daily activities; the anticipated duration of the absence; and whether the employee or the employee's family member intends to visit a healthcare provider or has a condition for which the employee or the employee's family member is under the continuing care of a healthcare provider. A specific statement is provided that calling in "sick," without providing additional information, will not be sufficient notice under the FMLA.

Section 825.304 retains the language from the earlier regulation stating that FMLA leave cannot be delayed due to lack of required employee notice if the employer has not complied with its notice requirements as set forth in Section 825.300.

Medical certifications (Sections 825.305, 306, and 307) – The general rule is that employers may require certification from a healthcare provider when the employee's need for leave is due to a serious health condition of the employee or a covered family member. Section 825.305(b) increases the time frame in which an employer should request medical certification from two to five business days after notice of the need for FMLA leave, and applies the general 15-day time period for the employee to provide a requested certification to all cases, including where the employee provides notice of the need for leave 30 days in advance. Section 825.305(b) and (c) provide employees additional time in which to either initially submit their medical certification or cure a deficiency in the certification if the employee is unable to comply with the initial time frame despite the employee's diligent, good faith efforts. Section 825.305(c) defines the process by which an employee can cure an incomplete or insufficient certification, requiring employers to state in writing what additional information was necessary and establishing a 7-day period for the employee to provide the additional information.

Continued on page 4

"NEW FMLA REGULATIONS" continued from page 3

Regarding medical certifications, Section 825.306(a) adds some changes including the addition of a healthcare provider's specialization; guidance as to what may constitute appropriate medical facts, including that a healthcare provider may provide a diagnosis; and whether intermittent or reduced scheduled leave is medically necessary. An employee remains free to choose to comply with the certification requirement by executing an authorization providing for the release of information required for a complete and sufficient certification. (Section 825.306(e)).

The final rule makes clear in Section 825.123(b) that an employer may, but is not required to, provide a list of essential functions when it requires a medical certification. In those cases in which the employer chooses not to include information on the certification form identifying the employee's essential functions, the healthcare provider may assess the employee's ability to perform his or her job based on the employee's own description of his or her job functions.

The DOL has decided to include two optional medical certification forms in the final rule, one form to be used when the need for leave is due to the employee's own serious health condition, and the second form to be used when the need for leave is to care for a family member with a serious health condition. (Section 825.306(b)).

The employer may use the procedure set forth in Section 825.307 to clarify a certification that does not clearly specify that an employee is unable to perform one or more essential functions. For example, if a certification specifies only that an employee is unable to life heavy objects, an employer may clarify with the healthcare provider whether the employee can perform the essential functions of his or her job of lifting 30 pounds. Section 825.307(a) requires that prior to any contact with the employee's healthcare provider for purposes of clarification or authentication of the FMLA certification, the employee must first be given an opportunity to cure any deficiencies in the certification pursuant to the procedures set forth. The rule makes clear that the employee is not obligated to permit his or her healthcare provider to communicate with the employer, but if such contact is not permitted and the employee does not otherwise clarify the certification, the employer may deny the taking of FMLA leave. The employer representative contacting the employee's healthcare provider must either be a healthcare practitioner, a human resources professional, a leave administrator, or other management official, but the employee's direct supervisor may not be the point of contact. The final rule makes clear that to the extent that a HIPPA-covered healthcare provider is required to share individually-identifiable health information with an employer, the HIPPA privacy rule will require a valid HIPPA authorization.

Recertifications (Section 825.308) – Where the certification includes a minimum period of incapacity in excess of 30 days, recertification generally may not be required until the minimum duration has passed. The employer is permitted to request recertification every six months in connection with an absence in all cases. Section 825.308(e) provides that employers may provide the employee's healthcare provider a record of the employee's absence pattern and ask whether the leave pattern is consistent with the employee's serious health condition.

Perfect attendance awards (Section 825.215(c)(2)) – The final rule provides that if a bonus or other payment is based on the achievement of the 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 otherwise paid to employees on an equivalent non-FMLA leave status.