



BENEFIT *Advisor*

In This Issue

In this third issue of the McGrawWentworth Benefit Advisor for 2008, we will discuss the recently issued proposed Family and Medical Leave Act (FMLA) regulations. The FMLA provides valuable job and health benefits protection in the event an employee or immediate family member experiences a serious health situation and needs extended time off work as a result.

While the intentions of these regulations are good, employers struggle to administer the regulations properly. The initial regulations lacked a definite roadmap for employers to follow in administration. As a result, employers are sometimes unsure of what situations would warrant protection under the FMLA. The new proposed regulations provide some clarity for employers. However, employers indicate that they failed to provide key clarifications for areas that they believe are regularly abused by employees.

We welcome your comments and suggestions regarding this issue of our technical bulletin. For more information on this Benefit Advisor, please contact your Account Manager or visit the McGrawWentworth web site at www.mcgrawwentworth.com.

“Proposed Revisions to the FMLA”

The Department of Labor (DOL) recently released the regulations most human resource professionals have been waiting for – the proposed Family Medical and Leave Act (FMLA) regulations. Employers have had problems administering the FMLA rules properly since their inception in 1993. Unfortunately, the proposed regulations still do not answer many questions employers have raised.

Employers must now take the time to understand these proposed regulations. The preamble to the regulations details the struggle the DOL had to determine appropriate changes without compromising the protections the FMLA offers families throughout the country. It explains the reasons why some changes were made while others were not.

If you are responsible for administering FMLA leaves, the preamble will help you understand why certain situations are still unclear. You can read the text of the new regulations, including the preamble, at <http://www.dol.gov/esa/whd/fmla/>. The proposed regulations are in the section titled “Compliance Assistance Materials”; you need to click on the Notice of Proposed Rulemaking in the first bullet.

This Advisor discusses the new regulations in detail, including:

- Serious Health Condition Defined
- Qualified Employers
- Eligible Employees
- Qualifying Leave Reasons
- Concurrent Leave Time/Substitution With Paid Leave
- Intermittent Leave
- Continuation of Group Health Plan Coverage
- Reinstatement After Leave
- Employer Notice Requirements
- Serious Health Condition Certification
- Extended Coverage for Military Personnel



Each section discusses the basic provisions of the law and any proposed changes.

These new regulations are not binding or effective yet. The DOL has asked for comments by April 11, 2008, and will evaluate these comments before it publishes the final regulations. However, some changes are merely clarifications. If the DOL clarifies an issue in the revised regulations, your organization should act on the clari-

fication. The DOL simply did not realize that some of the initial regulations were not clear.

Serious Health Condition Defined

The proposed regulations define key terms in a separate section and none of the definitions are shockingly different. A good part of the preamble is devoted to defining serious health conditions because the current definition leaves room for debate. On one hand, employers feel it allows too much abuse of FMLA protections. On the other hand, employee protection groups feel it adequately covers legitimate situations for job protection.

Although the current definition is not perfect, the DOL struggled to adequately modify it. According to the preamble, various definitions were considered. However, the DOL decided none of the proposed changes would improve on the current definition. In the end, the definition of serious health condition was only slightly changed to address employer concerns:

- A serious health condition means an illness, injury, impairment or physical or mental condition that involves inpatient care or **continuing treatment** by a health care provider. Cosmetic treatments, such as most plastic surgeries or acne treatments, are generally not considered serious health conditions unless inpatient treatment is required or complications develop. Restorative dental



services or plastic surgery after an injury or the removal of a cancerous growth are considered serious health conditions if they meet certain requirements. Even stress-related mental illness and allergy treatment may be considered serious health conditions if they meet the requirements.

- To evaluate a serious health condition, you first need to determine whether the condition requires inpatient care or continuing treatment. Continuing treatment means any one of the following situations exist:

1) **Incapacity and treatment:**

Incapacity for more than three consecutive calendar days and any subsequent related incapacity and treatment such as:

- a. A health care provider treats the employee 2 or more times within 30 days unless extenuating circumstances exist.
- b. A health care provider treats the employee once and prescribes continuing treatments, such as prescription drug treatment regime.

2) **Pregnancy or pre-natal**

care: Incapacity because of pregnancy or needed prenatal care.

3) **Chronic conditions:**

Incapacity or treatment because of a serious chronic health condition. A serious chronic health condition is one that:

- a. Requires periodic visits (defined as at least twice a year) to a health provider for treatment.
- b. Necessitates continuing treatment (including recurring episodes of a single underlying condition).
- c. Causes episodic, rather than a continuing period of incapacity (asthma, diabetes, epilepsy and so on).

4) **Permanent or long-term conditions:**

Permanent or long-term incapacity because the condition cannot be treated effectively. Examples of permanent or long-term conditions include Alzheimer's disease, a severe stroke or the terminal stages of a disease.

5) **Conditions that require multiple treatments:**

Any absence required for multiple treatments and any recovery time needed for those treatments. Examples include chemotherapy, radiation, kidney dialysis, physical therapy for arthritis, and so on.

The major change in the definition of serious health condition is the requirement that if an employee wants to take FMLA leave for an ongoing chronic condition, that employee must visit a health care provider at least twice a year for treatment. Employers argued that a significant amount of abuse occurred when employees took intermittent leaves for chronic conditions. The twice a year treatment requirement will give employers some ammunition to fight such abuse.

Qualified Employers

The FMLA covers employers with 50 or more workers for each working day during each of 20 or more calendar work weeks in the *current or preceding* calendar year. Public agencies and both public and private elementary and secondary schools are subject to the FMLA regardless of the number of employees. Generally, the employer is defined as the legal entity employing the worker.

The new FMLA regulations contain an integrated employer test allowing separate legal entities to be considered a single employer. Rather than looking at only one factor, the test considers the entire relationship including:

- Common management
- Interrelation between operations
- Centralized control of labor relations
- Degree of common ownership/financial control

The new regulations also clarify joint employer relationships and spend some time discussing the FMLA's impact on PEOs or Professional Employment Organizations.

A joint employer relationship exists:

- Where employers either share an employee's services or exchange employees.
- Where one employer acts directly or indirectly for the other employer in relation to the employee.
- Where the employers are deemed to share control of the employee.

Instead of applying a single rule, the regulations allow the facts and circumstances to determine whether a joint employer situation exists. In joint employer situations, the employer with the authority to hire and fire, assign or place the employee and manage payroll and benefits is considered the primary employer. The primary employer is responsible for administering the FMLA, including the notice requirements, the continuation of benefits, and so on. The secondary employer is typically at the worksite. The secondary employer is responsible for accepting employees back into their jobs when they return from an FMLA leave.

To determine whether an employer is subject to the FMLA, both the primary and secondary employers need to count the worker as an employee. For example, if an employer has 42 permanent workers but hires 12 temporary workers through a leasing firm, the employer would meet the 50 or more employee requirement. The 12 workers count toward both the pri-

mary employer and secondary employer.

The proposed FMLA regulations clarify how PEOs should be viewed. If a PEO simply outsources benefit or payroll administration, it is not considered a joint employer under the FMLA. However, if the PEO provides temporary workers to client employers, it is functioning as a joint employer.

Eligible Employees

The DOL has made a few minor changes to help employers identify employees eligible for FMLA protections. Determining employee eligibility is a two step process:

1. The employer must have employed the worker for at least 12 months at the point an FMLA leave is to begin. The 12 months need not be consecutive. If an employee has a break of service, the employer can disregard any period of previous employment more than 5 years before the most recent hire date when calculating whether the employee meets the 12 month employment requirement. A call to active duty in the armed forces is not counted as a break in employment. Also if the employer agreed not to recognize a break in service through a provision in a collective bargaining agreement, the break is not counted.



2. Once an employee meets the initial 12 month employment requirement, the employee must:

- Have worked at least 1,250 hours in the 12 months immediately preceding the leave date.
- Have worked for a company employing at least 50 employees within a 75 mile radius.
- Not have exhausted the allowed FMLA leave for that leave year.



- The employee has worked at least 1,250 hours in the past 12 months.

Then the employee will be protected under the FMLA while on a remaining paid leave as in this situation. Under the proposed regulations, employees laid off when they need an FMLA leave are not eligible for FMLA unless they are recalled or re-employed before they take the leave.

Determining an employee's eligibility is a key step in administering an FMLA leave.

Qualifying Leave Reasons

The reasons an employee may qualify for a leave remain unchanged:

- Giving birth or caring for a newborn child.
- Adopting a child or taking in a foster child.
- Caring for a spouse, child or parent with a serious health condition.
- Facing a serious health condition rendering the employee unable to perform the key functions of the job.

The preamble to the regulations also discuss the new changes related to leaves for service members called to active duty or to care for a service member injured in the line of duty. These new provisions are discussed in the final section of this *Advisor*.

The only material change in the definition of eligible employee is the concept that employers do not have to count past employment if an employee has a break of service of five years or more. The regulations also discuss how to treat an employee who meets the 12 month employment requirement while on a covered medical leave. For example, perhaps an organization has an employee who has worked 11 months and needs to take time off for a qualifying medical leave. The employee qualifies for paid leave under the employer's plan, but has not worked long enough to qualify for FMLA protections. If the employee receiving paid leave is still listed on the employer's payroll and one month into the leave satisfies the following criteria:

- The employee meets the 12-month work requirement (by virtue of being on the employer's payroll).

The changes in this section are not substantial but they do clarify the following issues for employers:

- The leave guidelines for the birth or adoption of a child have been moved to a separate section
 - The new regulations confirm the FMLA protects time off for prenatal care or pregnancy, including morning sickness.
 - Leave rights apply equally to mothers and fathers. Fathers must be granted FMLA time to attend prenatal appointments with the baby's mother.
 - If a husband and wife are employed by the same employer, they are entitled to a combined 12 weeks off for the birth or adoption of a child.
 - The new regulations include more details on FMLA leaves for adopting a child. These leaves apply to any time needed before the formal placement, such as counseling sessions or court visits. If the employee is adopting a child from another country, the FMLA also protects the time needed to travel to that country and any time needed in that country to complete the adoption process.
 - Employers can allow intermittent leave for birth or adoption but the FMLA does not require it.
- A leave to care for a child with a serious health condition is granted only for a child under the age of 18. If the child is over the age of 18, the child

must be “incapable of self-care because of physical or mental disability” at the time the leave begins.

- When employees request leave for their own serious health conditions, the employer can ask the health care provider to verify the employee cannot perform the functions of the position because of the medical condition.

For the most part, the reasons for an FMLA leave are unchanged, but the proposed regulations clarify many complicated issues.

12 Week Leave Period

Eligible employees are entitled to 12 weeks of FMLA leave in a 12-month period. This 12-month period is defined as the leave year. The proposed regulations did not change any of the employers’ options in defining the leave year. Employers can define the leave year as a calendar year, a fixed 12-month period, 12 months rolling backward or 12 months rolling forward. The key is that employers need to define their leave years in their FMLA policies and procedures.

The proposed regulations explain more fully how to count time toward FMLA:

- When an employee is taking a week’s leave and a holiday falls during the week, the full week counts toward the FMLA time.
- If the employer shuts down for an entire week while an employee is on an approved FMLA leave, that week does **not** count toward the FMLA leave time.

NOTABLE THOUGHTS

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- If an employee is taking an intermittent leave for only a day or two during the week of a holiday, that holiday does **not** count toward FMLA, unless the employee was scheduled and expected to work on that holiday.
- In counting intermittent leave time, the employer may limit the length of the time counted to the shortest period the employer’s payroll system uses to account for absences, provided it is one hour or less.



do so even if the employer does not require it. The new regulations clarify that the employer can apply any additional requirements in the paid leave policy to employees on an FMLA leave. If the employee does not comply with the additional requirements, the employee may not be allowed to substitute the paid leave. This in no way impacts the FMLA protections.

Many reasons an employee could take an FMLA leave would also qualify for benefits under an

employer’s short- or long-term disability plan. Disability and FMLA need to be evaluated separately to determine qualifications for benefits under the disability plan and job protection under the FMLA. If an employee qualifies for both, they run concurrently.

The new regulations provide more insight on how workers’ compensation and the FMLA interact, an area that has troubled employers. Under the proposed regulations, a serious health condition can result from circumstances on or off the job. An FMLA leave and a workers’ compensation absence can run concurrently if the injury or illness

These additional clarifications should help employers determine how to count time for FMLA leave.

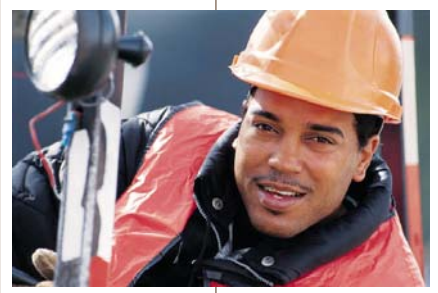
Concurrent Leave Time/ Substitution With Paid Leave

The FMLA has always allowed employees to substitute accrued paid leave for FMLA unpaid leave. For the purposes of this section, substitute simply means paid leave would run concurrently with FMLA. Employers may require the employee to use accrued paid leave concurrently or employees may elect to

meets the requirements of a serious health condition. Since workers' compensation leaves are considered paid leaves, substitution of employer's approved paid leave is not applicable. Unfortunately, the new rules do not go so far as to clarify whether an employer is *required* to run workers' compensation leaves and FMLA leaves concurrently. However, when reading through the section that addresses identifying FMLA leaves, it seems to imply if any reason meets the FMLA leave requirements it should be counted as such.

The new regulations also clarify how an employer should handle light duty offers when the FMLA and workers' compensation are running concurrently. If the provider treating the employee for the workers' compensation injury certifies the employee can return to doing light duty work, the employee can accept the light duty offer and return to work on a reduced basis. If an employee returns to light duty, the time working in light duty does not count against any FMLA leave entitlement remaining.

However, when the FMLA and workers' compensation run concurrently and the employee has a serious health condition and cannot return to work at full capacity, the employee can choose not to return to light duty until FMLA leave entitlement is exhausted. Workers' compensation benefits would end at the point the light duty offer is declined. At that point the leave becomes an unpaid leave and any employer-accrued paid leave may be substituted.



Intermittent Leave

Intermittent leave is an area where employers really struggle with the FMLA. The new regulations may help employers curtail some abuse, but probably not as much as employers had hoped for:

- The new regulations specify that employees still need to comply with their employer's policy when reporting a leave. This means if an employee is on intermittent leave, the employer can require the employee to follow the same procedures set forth for anyone reporting an absence. If an employee on an intermittent leave fails to follow the employer's absence reporting policy, the absence can be treated as an unexcused absence. However, employers are required to make exceptions to this policy if the facts and circumstances warrant it. For example, if employees fail to follow the normal reporting procedure because they are incapacitated and a family member calls in on their behalf, it is understandable the family member did not follow the absence reporting policy.
- Employees can use reduced or intermittent leave to care for a family member with a serious health condition.
- Intermittent leaves for employees with serious health conditions must be medically necessary.

- Employees must make a reasonable effort to schedule planned medical treatments during an intermittent leave so as not to unduly disrupt the employer's operation.

It is unfortunate the Department of Labor could not clarify intermittent leave more fully because employers feel these leaves have been widely abused by employees.

Continuation of Group Health Plan Coverage

The proposed regulations did not bring any significant changes to the employer's requirement to extend group health plan coverage. While the changes were not significant in this section, some areas that confuse employers have been clarified:

- Employers should treat employees on FMLA leaves the same as those actively at work. Therefore, any change in coverage for active employees applies to employees on an FMLA leave as well. During open enrollment the company must offer the same choices in group health plan coverage to employees on FMLA leave that it offers to employees actively at work.
- Employees can choose not to continue health plan coverage during an FMLA leave. If they drop their coverage, they are entitled to have it reinstated on the same terms as before when they return to work. Coverage must be reinstated the first day back to work with no new pre-existing condition limitations or requirements to provide evidence of insurability.

- Coverage under the group health plan can end before the end of the FMLA entitlement period. Some examples include:
 - The position is eliminated as part of a non-discriminatory reduction in workforce and had the employee been working, the position would have been eliminated with no opportunity to transfer to another position within the company.
 - The employee definitively informs the employer that he or she does not intend to return from the FMLA leave.
 - The employee fails to pay required premiums and the employer has met all legal requirements to notify the employee of his or her obligations.

The payment options remain the same. The new regulations clarify that if the employee is substituting paid leave during an FMLA leave, contributions must be continued under the same terms as if the employee was actively at work. This simply means the employer can require the employee to continue to pay health plan contributions through Section 125 pre-tax deductions.

Reinstatement After Leave

An employer can require an employee on an FMLA leave to report in periodically. The employer can also require a 2-day notice of a return to work. The employer's obligations under the FMLA cease when the employee officially notifies the employer that he or she does not intend to return to work.

When employees return from an FMLA leave, they are entitled to the same position or to an equivalent position with equivalent pay, benefits and other terms and conditions of employment. This section remains the same with the following changes and clarifications:

- If employees are no longer qualified for their position because they could not attend a certain course or meet certain licensing requirements, the employer must allow them a reasonable opportunity to fulfill any conditions when they return to work.
- The proposed regulations also substantially change the treatment of pay for an employee returning from an FMLA leave.



Let's say an employee is eligible for bonuses or discretionary pay and this additional compensation is based on achieving a specific goal such as hours worked, products sold or perfect attendance. If the employee fails to meet the goal because of the FMLA leave, the additional compensation may be denied unless employees on an equivalent non-FMLA leave status did receive the additional pay. For example, if an employer pays an attendance bonus to someone who takes a paid vacation during the measurement period, an employee on an approved FMLA leave who substitutes paid vacation during the leave should also qualify for the perfect attendance bonus.

- When employees return to work after an FMLA leave, the employer must reinstate all employee benefits. The employee, however, is not entitled to accrue any additional benefits or seniority during an unpaid FMLA leave. The FMLA leave should not be treated as a break in service for the purposes of pension or retirement benefits. If a plan requires an employee to be covered on a specific date in order to be credited with a year of service for vesting, contributions or participation purposes, an employee on an unpaid FMLA leave on that date is considered employed for these purposes. However, unpaid FMLA leave need

not be treated as credited service for the purposes of benefit accrual, vesting and eligibility to participate.

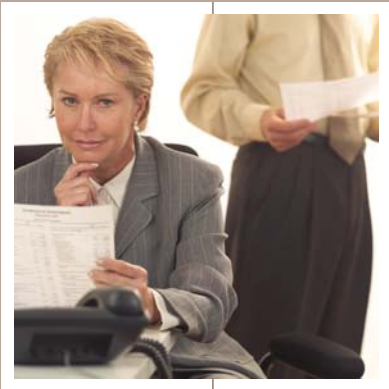
The regulations reiterate the employee has no greater right to reinstatement or other benefits than if the employee had been continuously employed during the FMLA leave period. If the employer eliminates a shift or reduces overtime while a worker is on an FMLA leave, the worker would not be eligible to return to the same position and the same overtime arrangement. Also if the employee was hired to work on a certain project and the project is completed while the employee is on an approved FMLA leave, the employer has no obligation to reinstate the employee.

Although the key employee provisions remain the same in the proposed regulations, the new regulations do provide a bit more detail on what types of situations would qualify for “substantial and grievous economic injury.” An employer cannot deny a key employee the right to take an FMLA leave; however, the employer does not need to protect a key employee’s job if the leave would cause an employer “substantial and grievous economic injury.” This “substantial and grievous economic injury” provision means an employer can permanently replace a key employee during an FMLA leave and the employer does not have to reinstate the employee if the cost would be prohibitive.

The employer is not obligated to restore employment or benefits if an employee obtains an FMLA leave fraudulently.

The FMLA prohibits employees from waiving their rights under this statute. The initial regulations were not clear on whether the waiver right

applied to an upcoming leave or a leave that has already occurred. The new regulations confirm employers cannot induce employees to waive their FMLA rights to an upcoming leave. However, employers can settle FMLA violations after the leave without DOL approval. The new regulations permit employees to waive any hypothetical FMLA violations in settlement agreements without DOL or court approval.



Employer Notice Requirements

Employer notice requirements have been changed a bit by the new regulations. The preamble contains a significant discussion of notice requirements. In general, the belief, strongly promoted by family groups, is that employees are still not aware of the protections the FMLA offers. The general belief is that the information employees receive does not adequately explain their FMLA rights.

The proposed regulations include these required notices:

- **General notice:** Every employer must post a notice in a conspicuous place where employees congregate, informing employees of their FMLA rights. The poster and the text must be large enough to be easily read and contain fully legible text. Failure to post the notice may result in a fine. Covered employers must post the notice, even if no employees are eligible for

FMLA protected leave at their location. The recommended wording of the poster has been modified. The proposed wording can be found in Appendix C of the proposed regulations. If a significant number of employees cannot read English, the poster must be written in the employees’ native language.

- **Eligibility notice:** When employees request an FMLA leave or when the employer knows requested leaves may be for FMLA-qualifying conditions, the employer must notify employees within 5 *business days* that they are eligible. The employer must also notify employees of any additional requirements. This notice must:

- State whether an employee is eligible for an FMLA leave or not. If the employee is eligible, the notice must state the amount of FMLA leave time remaining in that 12 month period. If the employee is not eligible for an FMLA leave, the notice must give the specific reason the employee does not qualify.
- Include the following points:
 - ◆ Leave is designated as FMLA leave and will be counted against the 12-week entitlement.
 - ◆ Employees must submit a Serious Health Condition Certification. The notice must also specify the deadline for submitting the certification and explain the consequences for failing to submit it.
 - ◆ The employer’s right to substitute paid leave, whether the employer is going to require the substitution and any additional requirements the employee needs to meet in order to substitute paid leave.

- ◆ Any requirement for the employee to continue paying for group health coverage and the options for employees to pay their contributions to continue group health coverage – this information must include the consequences if an employee fails to make a payment on time.
- ◆ Any fitness for duty requirements the employee must meet to be restored to the position after returning to work. The employer can provide a list of the employee's essential functions.
- ◆ Whether the employee is considered a "key employee" and how that may affect job restoration.
- ◆ The employee's potential responsibility to pay the full amount of health plan premiums if the employee fails to return from an FMLA leave.

The notice may include additional information, such as whether periodic status reports will be required while the employee is on leave. The employer must provide this specific notice no less than once during a six-month period when the employee notifies the employer that he or she needs an FMLA leave (typically for intermittent leaves). Employers must respond to employees' questions during an FMLA leave.

The new regulations offer a prototype of the eligibility notice in Appendix D of the proposed regulations.

- **Designation notice:** Employers need to notify employees whether the leave qualifies as an FMLA leave. If an employee needs to submit the serious health certification first, the employer would issue the designation notice after receiving the certification and deciding the employee is entitled to the leave. The employer is required to notify the employee whether the leave will be FMLA protected within 5 business days of the decision. In addition, this notice must state specifically how much time will be counted toward the leave based on the certification. In the case of an intermittent leave, where the specific time frame cannot be determined, the employer must issue the designation notice every 30 days so the employee is very aware of the time the employer is counting toward the FMLA leave. This notice must be in writing, but the guidance does not stipulate the form. If an employee is substituting paid leave or taking intermittent leave, the designation notice could be a note on the employee's pay stub. A sample designation notice is provided in Appendix E of the proposed regulations.



Failure to provide any notice the FMLA requires may be considered interference with, restraint or denial of employee's FMLA rights. An employer may be held liable for compensation and benefit loss sustained because of the violation. The employee may seek equitable relief for any loss associated with the violation including reinstatement, lost promotional opportunities and any harm suffered.

The employer is responsible to designate leave, paid or unpaid, as qualified for FMLA. The employer determines whether a leave is protected by FMLA based on the information the employee provides.

The employee also has responsibilities under the FMLA. An employee is required to notify the employer of the need for an FMLA leave. The employee is still not required to request an FMLA leave directly; however, the employer may ask questions about the reason for the leave to determine whether the FMLA applies. The employee must give the employer 30 days' notice of a request for leave when leave is foreseeable. If the leave is not foreseeable, the employee must give notice as soon as practicable.

Serious Health Condition Certification

An employer may require an employee to prove a requested leave is for a serious medical condition. Employers have frequently struggled with the serious health condition certification. The recommended form, in the minds of many, was unclear and lacked the specific information employers needed to make that decision.

The DOL has reformatted its optional form (WH 380, as revised) in response to the feedback it received. The new, revised form is in Appendix B of the proposed regulations. The employer can use this DOL form or a similar form to decide whether a serious health condition exists. If employers do not use the DOL form, they must take care that the form they do use does not ask for more information than the DOL allows.

The employer must give employees 15 calendar days to have their health care providers complete the form. Under the new regulations, a physician's assistant is now considered a health care provider. Moreover, the employer is entitled to a complete form. If an employee submits an incomplete serious health condition certification, the employer needs to point out the deficiencies and give the employee an additional 7 days to complete the certification. If an employee fails to submit a complete serious health care certification, an employer can delay or deny the FMLA leave.



The new regulations allow employers to contact physicians directly to clarify the details of authenticity of a serious health condition certification. Employers can now also specifically explain the employee's key job functions and ask the provider to detail how the serious health condition affects the employee's ability to do the work.

Under the new regulations, an employer can require an employee to sign a HIPAA authorization. This authorization allows the employer to ask the provider about information

listed on the serious health questionnaire. If an employee does not sign this authorization, the employer can decline the request for an FMLA leave.

Employers can still request a second or even third opinion if needed. They can temporarily approve the FMLA while they seek a second or third opinion. The new regulations will allow an employer to use a health care provider that they use for other purposes in a second opinion situation **only if** the employer is located in a rural area where there is limited access to health care providers in a particular specialty.

Despite many comments from employers arguing about the impracticalities of accepting medical certifications from physicians in foreign countries, the new regulations make no change in this area. Employees can still use a foreign medical provider to certify a serious health condition. If the employee is temporarily abroad, the employer can request second and third opinions. However, this is a difficult process when the employee is located in another country.

The process for recertifying a serious health condition remains largely unchanged. The employer cannot request a recertification of a serious health condition during the initial timeframe noted on the serious health certification. Once the initial timeframe elapses, the employer can request a recertification every 30 days. The employer can request a recertification more frequently if the employee requests an extension of the leave or circumstances relating to the health condition have changed significantly.

Employers may find these examples helpful:

- An employee is approved for a four-week FMLA leave for knee surgery and rehabilitation. In the third week, the employee shows up to play short stop for the company's softball team. This action would allow an employer to question the validity of the initial certification and request a recertification.
- An employee suffers from migraines and has a serious health condition certification that indicates the typical duration of a migraine episode is 2 days. The employee takes intermittent leave throughout the year. Upon examining the situation, the employer finds the employee's typical leave was 4 days for a migraine and typically encompassed a weekend. This discrepancy can warrant the employer to ask for a recertification.

Some of the clarifications of the serious health condition certification will help employers decide whether a leave should qualify for the FMLA.

Extended Coverage for Military Personnel

The proposed regulations do not yet adopt the recent changes made by the National Defense Authorization Act of 2008. The changes made to the FMLA by the National Defense Authorization Act are discussed in our Special Alert at http://www.mcgrawhrentworth.com/Special_Alert/2008/Special_Alert_Issue_1.pdf. The preamble states that only the extension of the FMLA leave rights to 26 weeks to care for an injured service member is currently in effect.

The new leave granted for employees called to active duty will not go into effect until the DOL defines "qualifying exigencies" and other key provisions related to these leaves. The preamble goes into significant discussion of the feedback the DOL is looking for before issuing regulations addressing these expanded FMLA rights. The DOL is looking for comments especially in the following areas:

- Does each covered service member have only one next of kin eligible for FMLA leave to provide care for a serious illness or injury? If so, how does that affect the person entitled to provide this care? What if your employee is the next of kin but not eligible for FMLA; should another relative be allowed to take the leave and care for the service member?
- Should the definition of child be broadened for the military leave provisions to encompass adult children capable of caring for an injured parent?

- Should qualifying exigencies be limited to urgent or one-time situations arising from deployment as opposed to routine everyday military needs?
- Should employees be limited to taking only one 26-week leave to care for an injured service person in their lifetime? What if a mother has a son injured one year that needs care for 26 weeks and has another son injured 2 years later and needs care as well? Should that mother be allowed two 26 week periods?
- How should the special rules that apply to public schools be amended to account for the new military leave expansion?
- How should "next of kin" be defined and determined?

The preamble will give your organization a good sense as to the issues the DOL wants to settle in the next round of guidance. That guidance should put more meat on the bones so employers can understand the scope of the military expansions for the FMLA.



Concluding Thoughts

The new regulations fall short in many areas for employers. However, it is a good idea to read through the preamble of these proposed regulations; it will certainly provide a sense for how all parties involved view the Family and Medical Leave Act.

Employers can act on this new guidance in good faith, even though technically it is not yet effective, or your organization can hold off until the DOL comment period closes and it issues new final regulations. At any rate, the clarifications in these proposed regulations will help employers resolve some of the issues they are struggling with as they administer FMLA today.

If you have any questions regarding these new proposed regulations, please contact your McGrawHentworth Account Manager. **MW**

McGraw Wentworth Team

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