RECENT DEVELOPMENTS UNDER THE FAMILY AND MEDICAL LEAVE ACT

By

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I. INTRODUCTION

A. The Family Medical Leave Act (FMLA) is 15 years old. As predicted upon enactment, the FMLA has helped many American workers … and hassled many human resource professionals.

B. Just as many human resource professionals were becoming somewhat comfortable with the FMLA, the rules are changing.

C. Two recent developments, the passage of the National Defense Authorization Act of 2008 and the publication of new proposed FMLA regulations by the Department of Labor, have worked a sea of change in benefit management.

II. MILITARY SERVICE LEAVE RIGHTS

A. General Overview

1. On January 28, 2008, H.R. 4986 was signed into law. Section 585(a) of the National Defense Authorization Act for FY 2008 (NDAA) amended the FMLA.

2. A fifth category was added to the existing FMLA leave provisions contained in Section 102(a) of the FMLA. Eligible employees will be able to take up to 12 weeks of unpaid leave for "qualifying exigencies" arising out of a covered family member's active military duty in support of a "contingency" operation. 29 U.S.C. § 2612(a)(1)(E) (FMLA § 102(a)(1)(E)).

3. A new leave category was created. An eligible employee may take up to 26 weeks of protected leave to care for a spouse, son, daughter, parent or covered family member recovering from a serious illness or injury incurred

in the line of duty during active service. See 29 U.S.C. § 2612(a)(3); FMLA § 102(a)(3).

4. These new provisions are radically different from the current FMLA. The Department of Labor (DOL) must issue regulations to flesh out the new provisions. In the meantime, the 26-week injury leave is already effective.

B. Definitions

1. Qualifying Exigency. Websters – "requiring immediate action." The DOL is asking for input. The DOL has asked for comments on what should constitute a qualifying exigency for purposes of the family military leave provision. Although the DOL has opined that not every exigency will entail but rather will entitle a family member to leave, it appears that a very broad definition will be adopted. Employers should presume that time spent caring for children of a son, daughter, parent or other next of kin who has been called to active duty will constitute a qualifying exigency. It remains to be seen whether the DOL would include time off to sell a house, relocate or making arrangements for child care, attending ceremonies or obtaining financial counseling.

2. Next of Kin. The NDEA defines "next of kin" as "the nearest blood relative of that individual." The DOL is asking for input on this definition. The DOL might define next of kin based upon existing Department of Defense interpretations. In the alternative, the DOL may adopt a broader definition defining next of kin as "any blood relative."

3. Son or Daughter. The DOL has asked whether the definition of "son or daughter" needs to be changed for purposes of family military leave. One must be 17 years old to serve in the military. The current definition defines "son or daughter" as someone under the age of 18 or older than 18 but incapable of self-care because of a mental or physical disability. Thus, it would appear that most parents would not qualify for FMLA protected leave.

4. Contingency Operation. A contingency operation is defined as a military operation that is (1) designated by the Secretary of Defense as an operation in which members of the Armed Forces are or may become in military actions, operations, or hostilities against an enemy of the United States or against an opposing force; or (2) recognized by law as existing if the military operation results in the (1) call up to (or retention on) active duty of members of the uniformed services under certain enumerated statutes. See 10 U.S.C. § 101.

C. Questions and Concerns

1. The definition of service members covered under the new FMLA leave provision is different, and somewhat narrower, that the definition used under the Uniformed Services Employment and Reemployment Rights Act.

2. The NDAA does not alter the current FMLA definition of "son or daughter."

3. The 26-week military care leave entitlement has a potential significant broad reach.

III. New FMLA Regulations

A. General Overview – The FMLA After Fifteen Years

1. Scope and Coverage. It has been fifteen years since the enactment of the Family Medical Leave Act. The Department of Labor reports that in the most recent year for which statistics are available, 2005, nearly 100 million American workers were covered by the FMLA. Over 7 million took FMLA and 1.7 million took intermittent leave.

2. Litigation Under the FMLA. Since its enactment, the FMLA has generated an avalanche of litigation. The Supreme Court first examined the FMLA in Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81 (2002). In Ragsdale, the court struck down regulation imposing categorical penalties on employers allegedly violating the Act. Ragsdale involved the draconian notice requirements contained in 29 CFR 825.700(a). Similarly, numerous courts held that the requirement to notify an employer of leave status before commencement was likewise invalid. See Woodford v. Cmty. Action of Greene County, Inc., 268 F.3d 51 (2d. Cir. 2001). The definition of "serious health condition" has also been given quite a bit of attention by the courts. See Meller v. AT&T Corp., 250 F.3d 820 (4th Cir. 2001); Thorson v. Gemini, Inc., 205 F.3d 370 (8th Cir. 2000).

3. New Regulations. Against this backdrop, the DOL issued proposed regulations attempting to clarify problem areas. The highlights of the regulations will be addressed below.

B. Scope and Coverage of FMLA

1. The concept of "joint employment" has always been present in the FMLA.

a. The original regulations dictated that "joint employers" had to count "joint employees" for the purpose of determining coverage and eligibility. See 29 CFR § 825.106; 29 CFR § 825.111(A)(3).

b. For example, an employer with 40 regular and 15 leased or temporary employees would be covered.

c. While the "primary" employer had to restore the employee to a position after FMLA, the "secondary" employer was required to accept the employee.

2. Professional Employer Organization

a. Under the current regulations, there is no distinction between an employee leasing entity and a professional employer organization. During the comment period, the DOL received a number of comments regarding the difference between these organizations. Many of these comments were prompted by Wage and Hour Opinion Letter FMLA-111 (Sept. 11, 2000) where the department concluded that a professional employer organization was a joint employer under the FMLA. The comments uniformly explained that, while there are various differences from one entity to another, generally a PEO merely assumes certain administrative functions for its clients such as processing payroll and benefits coverage in administration. Proposed comments preamble. On the other hand, an employee leasing organization is often involved in the day-to-day operations of a client's business.

b. The Department proposes to amend Section 825.106(b) to clarify that PEO's that contract with client employers merely to perform administrative functions such as payroll and benefits administration, are not joint employers with their clients, provided they merely perform such administrative functions. On the other hand, the regulations clarify that if a PEO has the right to hire, fire, assign or direct and control employees, or if the PEO benefits from the work that the employees perform, the PEO would be considered a joint employer with the client company.

3. Public Agency Coverage

a. The Department of Labor proposes new regulations concerning what constitutes a "public agency" for purposes of coverage under the FMLA. Under the present regulations, the dispositive test for determining whether a public agency is a separate and distinct entity and therefore, a separate employer for determining eligibility is the U.S. Bureau of the Census' "Census of Governments." See U.S. Census Bureau, 2002 Census of Governments, Vol. 1, #1, Government Organization, G.C.O. 2(1)-1. (www.census.gov).

b. The current regulation contrasts with those issued under the Fair Labor Standards Act. Under the FLSA, the Census of Governments

is merely one of the factors examined for determining whether a public agency is a separate entity. The Department of Labor is asking for comments as to whether it should abandon its present single factor test in favor of the test used under the FLSA.

C. Definition of Serious Health Condition

1. The Department of Labor has proposed clarifying what constitutes a "serious health condition." The DOL proposed changes to Section 825.113 of the Regulations. In the preamble to the proposed regulations, the Department of Labor conceded that its present definition of "serious health condition" has drawn quite a bit of criticism because the definition is broad enough to cover seemingly insignificant ailments such as colds and mild intestinal problems. It appears, however, that the Department of Labor will refuse to make any changes that will clarify matters from a practical standpoint.

2. The DOL proposed regulation include a clarification of the time period within which an employee must visit a health provider two times when coupled with three consecutive days of incapacity. While this proposed change doesn't address the problem contained in the present definition, it will most likely be upheld by the courts. For example, in Thorson v. Gemini, Inc., 205 F.3d 370, 380 (8th Cir. 2000), the court noted that the Department of Labor's definition may currently provide that some absences for minor illnesses that Congress did not intend to be classified as serious health conditions may nevertheless qualify for FMLA protection. The court went on to say, however, that the Department of Labor reasonably decided that there is a legitimate tradeoff for having a definition of serious health condition that sets out an objective test that all employers can apply uniformly.

3. The proposed regulations also clarify that "periodic" means visiting a physician at least two times per year for the same condition. This will be of some use as it will quantify what is currently a fairly hazy definition.

4. The proposed regulations are aimed at providing some guidance in connection with the use of intermittent leave. The Department of Labor proposed modifying its interpretation as to when overtime hours taken as intermittent leave can be counted against the FMLA leave entitlement. Under the current regulations, it is unclear whether an employee who is limited to 40 hours of work a week is taking FMLA leave. See Preambled Discussion to 29 C.F.R. § 825.203. In the proposed regulations, the Department of Labor clarifies that if an employee would be required to work overtime hours but for the FMLA leave entitlement, the hours the employee would have been required to work may be counted against the employee's FMLA entitlement.

D. Substitution of Paid Leave

1. Presently, 29 C.F.R. § 825.207 addresses interaction between unpaid FMLA leave and other types of paid leave. The Department of Labor proposes a substantial change in the application of this provision.

2. The proposed regulations clarify that the terms and conditions of an employer's paid leave policy apply and must be followed by the employee in order to substitute any form of accrued paid leave, including paid vacation, personal leave, family leave, paid time off and sick leave. The present regulations severely limit an employer's ability to impose such conditions. See Wage and Hour Administrative Opinion, FMLA 2004-3-A (October 4, 2004). For example, under the proposed regulations, if an employer requires that vacation leave be taken in full day increments, an employee substituting vacation for FMLA leave would have no right to use less than a full day of vacation for a full day of FMLA leave. Similarly, notice and certification requirements contained in paid leave policies can be imposed on employees taking FMLA leave. The regulations dictate that employers make employees aware of any such restrictions associated with the leave. This should be done in writing. We advise modifying employee handbooks to clearly address this point.

3. Under the proposed regulations, an employer is still prohibited from requiring that FMLA leave run concurrent with paid leave when an employee is drawing disability benefits.

E. Consecutive Employment

1. The current definition of "eligible" employee states that the requisite twelve months of prior service need not be "consecutive." Interpreting this definition, the First Circuit Court of Appeals in Rucker v. Lee Holding, Co., 471 F.3d 6 (1st Cir. 2006), held that even where an employee had a break in employment in excess of five years, the employee was entitled to use the prior employment toward satisfying the twelve month requirement. A number of commentors strongly condemned this ruling. The commentors noted that this would impose a "tremendous administrative burden" on employers. See Preamble to Proposed Section 825.110. Other commentors urged the DOL to adopt this expansive reading.

2. The Department of Labor attempted to reach a compromise. The proposed rule dictates that employers need not count breaks in service of five years or longer except where such absence is the result of military leave or an approved leave under a written agreement or collective bargaining agreement where the employee would have an expectation of being returned to the workplace.

3. Employers should be cautious if the proposed regulations become law. Note that the FMLA only requires that leave related documents be maintained for three years. Although the employee would have to establish eligibility under

the proposed rules, employers would be prudent to retain records for a period of five years so that they can clearly rebut any claim of eligibility.

4. The proposed regulation addressed the situation where an employer allows someone to take leave before reaching their twelve month anniversary. Employers had hoped that the Department of Labor would allow them to receive "credit" for this generosity. The DOL rejected this approach and the proposed regulations dictate that, once they have been employed for twelve months, an employee is entitled to the full compliment of twelve weeks leave, even if an employer had given them leave related to the same condition prior to the twelve month anniversary.

F. "Worksite" Definition

1. In Harbert v. Healthcare Service Group, Inc., 391 F.3d 1140 (10th Cir. 2004), the Chancellery Court of Appeals held that the existing regulations regarding the location of a worksite were "arbitrary and capricious" because they failed to rely upon a common understanding of the worksite as being the location where the employee actually does work. Under the proposed regulations, individuals who are "jointly employed" and are assigned at a fixed worksite for a period of at least one year will be deemed to be employed at that worksite.

G. Care for a Family

1. The proposed regulation contained "clarifications" of the coverage of a spouse, parent or child with a serious health condition.

2. The regulations clarify that in determining whether an adult child has a disability entitling their parent to FMLA leave, the determination as to whether the child is disabled should be made at the time the leave is to commence. Thus, the DOL rejected the Bryant v. Delbar, 18 F.Supp.2d 799 (M.D. Tenn. 1998) decision here the disability determination was made well after leave commenced.

3. The proposed regulation enhanced 29 C.F.R. § 825.113(d) and expand examples of documentation that may support a qualified family relationship such as a signed tax return.

4. The DOL refused to narrow the broad scope of the family care provision. The proposed regulation makes it clear that an employee need not establish that they are the "only" family member who can provide care. The DOL stated that "it will often be the case that there are multiple potential caregivers" who may need to take FMLA leave.

H. Retroactive Designation

1. In Ragsdale v. Wolverine Worldwide, Inc., 535 U.S. 81 (2002), the Supreme Court invalidated the penalty provision contained in 29 C.F.R. § 825.700(a). That provision presently dictates that if an employee takes FMLA leave and the employer fails to designate the leave as such "the leave taken does not count against the employee's FMLA entitlement."

2. The proposed regulations allow employers to retroactively designate leave. They may do so, only if there is no "individualized harm" to the employee. In laymen's terms, this means that the employee will have to be able to show some prejudice as a result of the late designation. Typically, where the leave is for the employee's own serious health condition, they will not be able to show any harm as they would not be able to postpone the leave. The DOL specifically acknowledges this fact. On the other hand, if an employee anticipates they will need FMLA leave later in a leave year for a planned medical treatment, adoption or childbirth, they may be able to show harm by establishing that they would have chosen a different leave schedule or made other arrangements. For example, the employee may be able to show that they would have coordinated FMLA leave with their spouse.

I. Light Duty

1. Present regulation Section 825.220(d) is unclear as to whether FMLA leave runs concurrent with light duty. The proposed regulations delete the confusing light duty language and are intended to make it clear that when an employee is working a light duty assignment, the employee is not on "leave" and therefore, is not "burning" FMLA leave entitlement.

2. Under the proposed regulations, employers retain the right to run FMLA leave concurrent with a total absence covered by workers' compensation. Likewise, employees retain the ability to decline an offer of light duty and instead elect to use FMLA leave. By doing so, however, employees may endanger their workers' compensation benefits.

J. The Treatment of Holidays

1. The proposed regulations reaffirm the Department's current interpretation that when a holiday falls during a work week and the employee is taking the entire week as FMLA leave, the holiday counts against the employee's twelve week entitlement. The proposed regulations clarify that this rule does not apply when the employee is taking leave in increments of less than a full week.

2. Thus, an employee working a regular five day week who works only Monday and Tuesday during the Thanksgiving holiday week and then takes FMLA leave on Wednesday, Thursday and Friday an employee would burn only two fifths (2/5) of a week of leave entitlement.

K. Penalties

1. Responding to requests for clear regulatory edicts prohibiting FMLA discrimination and interference, the proposed regulations clearly state the remedy for interfering with an employee's rights under the FMLA.

2. An employer may be liable "for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered."

L. Perfect Attendance Awards

1. Under the present regulations, employers are severely restricted as to when they can award perfect attendance bonuses. Essentially, employees who have missed time from work for FMLA-covered reasons would be entitled to perfect attendance bonuses. Iowa employers should note that the current regulation is of questionable import in light of the Eighth Circuit's decision in Chubb v. City of Omaha, 424 F.3d 831 (8th Cir. 2005). The proposed regulation would permit an employer to disqualify an employee form a bonus or award predicated on the achievement of a goal where the employee fails to achieve that goal as a result of an FMLA absence. The specified goals may include hours worked, products sold or perfect attendance.

2. Employers should nevertheless remain cautious when adopting perfect attendance programs. It would be wise not to disqualify an employee from a bonus where employees taking other types of leave such as paid vacation may be entitled to receive awards.

M. Revisions to the Medical Certification Process

1. The proposed regulations clarify the confusing FMLA medical certification process. The proposed rules, which are found at Sections 825.305 through 825.311, outline precisely what must be done when an employer receives an incomplete certification.

2. Significantly, employers would be allowed to contact healthcare providers directly to clarify or authenticate certifications.

N. Fitness for Duty Exams

1. The proposed regulations allow an employer to require that the certification to return to work address the employee's ability to perform the "essential functions" of the employee's particular job. In addition, where safety concerns exist, an employer may require a fitness for duty certification before an employee returns to work even after intermittent leave.

O. Releases

1. Several recent decisions interpreted the existing regulations as prohibiting employees from waiving their rights under the FMLA absent oversight by a court or the Department of Labor.

2. The regulations make it clear that employees may voluntarily agree to settle past FMLA claims without obtaining approval from the DOL or a court.

IV. Conclusion

A. It remains to be seen whether the proposed regulations will be adopted in whole or in part. Simply put, the regulations are a mixed bag. They provide some additional freedom and clarification to employers, but maintain some of the troubling aspects of the current regulations.

B. Employers should be prepared to react to and take advantage of the regulations as soon as they become law.