

EMPLOYMENT ALERT



FMLA EXPANDED TO COVER MILITARY FAMILY LEAVE AND DOL PROPOSED NEW FMLA REGULATIONS

Enacted in 1993, the federal Family and Medical Leave Act (FMLA) provides that covered employers must grant eligible employees up to 12 weeks of unpaid leave within a 12-month period for (1) the birth and care of a newborn child, (2) the adoption of a child, (3) the care of an immediate family member with a serious health condition or (4) medical leave when the employee himself or herself is unable to work due to a serious health condition.

Recently President Bush signed into law the National Defense Authorization Act of 2008 (NDAA), which extends the FMLA to allow leave in certain circumstances to care for a family member who has served in the Armed Forces. Some of the provisions of the NDAA are effective immediately, and employers should amend their policies to reflect these new provisions.

In addition, as the result of complaints from both employers and employees, the Department of Labor (DOL) has recently begun the process of making substantial revisions to the FMLA's implementing regulations for the first time since the FMLA was enacted.

The DOL recently issued a Notice of Proposed Rulemaking proposing numerous changes to the FMLA's implementing regulations, and calling for public comment before the regulations become final. In addition to certain minor changes and general reorganization of the regulations for ease of reference, the draft regulations propose numerous substantive changes to the current regulations, the most pertinent of which are summarized below and contained in the chart on the following pages.

The DOL's proposed regulations also leave certain major issues unaddressed. Most significantly, with respect to intermittent FMLA leave, numerous comments were generated during the comment period on the issue of whether an entire shift should be chargeable as FMLA leave to an employee who takes intermittent leave and has a job that precludes commencing work midway through a shift (e.g., a flight attendant who takes one hour of leave, causing that employee to miss a 12-hour scheduled flight assignment). While the DOL has proposed no changes to the current regulations at this time, it seeks additional comment from the public on this issue and what language should be included in the final rule, if any.

EFFECTS FOR EMPLOYERS

Employers must be aware that the military family leave provisions contained in the NDAA, permitting a “spouse, son, daughter, parent or next of kin” to take up to 26 work weeks of leave to care for a “member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list for a serious injury or illness,” are effective immediately. FMLA policies should be altered to reflect these changes. In addition, employers must post notice of the new FMLA amendments in the same locations where other labor laws are posted. A DOL-approved flyer may be retrieved from the following link: <http://www.dol.gov/esa/whd/fmla/NDAAAmndmnts.pdf>.

At this time, the DOL regulations are only proposed changes. However, the DOL has indicated that it intends to issue final regulations before the end of the Bush Administration. If the DOL’s proposed revisions to the FMLA’s implementing regulations are enacted largely as set forth in the Notice of Proposed Rulemaking, there will be significant changes to both employer and employee responsibilities under the act.

MILITARY FAMILY LEAVE

Section 585 of the NDAA, which was signed into law by President George W. Bush on January 28, 2008, extends the FMLA effective immediately to provide two new rights to leave relating to military service:

- ***New leave entitlement.*** The NDAA provides that an eligible employee who is the spouse, son, daughter, parent or next of kin of a covered service member who is recovering from a serious illness or injury sustained in the line of duty while on active duty may take up to 26 work weeks of leave in a single 12-month period to care for that service member. During that 12-month period, an eligible employee is entitled to a total of 26 weeks of FMLA leave (i.e., the 26 weeks of military FMLA leave cannot be added onto an additional 12 weeks of regular FMLA leave). “Serious injury or illness” is defined as an injury or illness rendering the service member medically unfit to perform their duties.
- ***New qualifying reason for leave.*** The NDAA also amends the FMLA to provide a new qualifying reason for leave, allowing eligible employees up to 12 weeks of leave due to “any qualifying exigency” relating to the fact that the spouse, son, daughter or parent of the employee is on active military duty or has been informed of an impending call to active military duty, in support of a contingency operation. What constitutes a “qualifying exigency” is to be defined by the DOL in its implementing regulations. “Contingency operation” is defined as a war, national emergency or any operation in which members of the armed forces may become engaged in military actions against an opposing military force.

This extension of the FMLA is effective immediately, although the DOL is currently in the process of issuing implementing regulations defining and elaborating on the NDAA provisions, and is seeking public comment regarding those regulations. Employers should also note that the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) provides that members of the military, National Guard or Reserve are entitled to combine the time of their military service with the time worked for their employers for purposes of determining FMLA eligibility.

SUMMARY OF KEY CHANGES IN DOL PROPOSED REGULATIONS

Subject	Under the Current Regulations:	Under the Proposed Regulations:
<p>Definition of “serious health condition”</p> <p>29 C.F.R. § 825.114</p>	<ul style="list-style-type: none"> • Employees with chronic illnesses must make “periodic” visits to a health care provider. 	<ul style="list-style-type: none"> • Employees with chronic illnesses would have to visit a health care provider at least twice a year. • Employees claiming eligibility due to treatment and incapacity would have to make two visits to the health care provider within 30 days of the incapacity absent extenuating circumstances.
<p>Intermittent Leave</p> <p>29 C.F.R. §§ 825.203 to 825.205</p>	<ul style="list-style-type: none"> • Employees seeking intermittent leave must “attempt” to schedule leave so as not to unduly disrupt employers’ operations. • No requirement that employees seeking unforeseeable, intermittent leave follow normal employer call-in procedures. 	<ul style="list-style-type: none"> • Employees seeking intermittent leave must make a “reasonable effort” to schedule leave so as not to unduly disrupt employers’ operations. • Employees seeking unforeseeable, intermittent leave would have to follow normal employer call-in procedures except in emergencies.
<p>Substitution of Paid Leave</p> <p>29 C.F.R. § 825.207</p>	<ul style="list-style-type: none"> • Employees and employers can substitute accrued paid leave for FMLA leave for absences relating to the birth or adoption of a child, care of an immediate family member or the employee’s own serious health condition. • When employers’ procedural requirements for taking paid leave are less stringent than the FMLA’s requirements, employees cannot be held to the higher FMLA standard. 	<ul style="list-style-type: none"> • Employers would not be required to allow the substitution of paid leave for unpaid FMLA leave if that substitution would be inconsistent with employers’ policies for paid leave (e.g., advance notice requirements, etc.). • Employers would have to provide notice to employees about any additional substitution procedures. • Employees would have to comply with FMLA notice requirements, even if more stringent than employers’ policies.

Subject	Under the Current Regulations:	Under the Proposed Regulations:
<p><i>Employer Notice Requirements</i></p> <p>29 C.F.R. §§ 825.300, 825.301</p>	<ul style="list-style-type: none"> • Employers must provide notice that leave is being designated as FMLA leave within two business days after employees provide notice of leave. • Employers must provide employees with general notice of FMLA rights. • Employers must provide notice of eligibility for FMLA leave within two business days after employees request leave or employers acquire knowledge that leave is FMLA-qualifying. • Employers generally cannot retroactively designate an absence as FMLA leave. 	<ul style="list-style-type: none"> • Employers must provide notice that leave is being designated as FMLA leave within five business days after employees provide notice of leave, and must provide information regarding the amount of time to be designated as FMLA leave, if possible. • The general notice requirement could be satisfied through electronic posting. • Employers must provide notice of eligibility for FMLA leave within five business days after employees request leave or employers acquire knowledge that leave is FMLA-qualifying. Employers must also provide additional information, including reasons why employees are not eligible for leave, if applicable. • Employers could retroactively designate an absence as FMLA leave in certain circumstances. Employers and employees also could mutually agree to retroactively designate FMLA leave. • When future leave is needed but the exact amount is unknown, employers must inform employees every 30 days that the leave has been designated FMLA leave.
<p><i>Employee Notice Requirements</i></p> <p>29 C.F.R. § 825.302</p>	<ul style="list-style-type: none"> • If leave is foreseeable, employees must give at least 30 days' notice. • If 30 days' notice is not possible, employees must give employers notice within one to two business days of when the need for leave becomes known. • Employees may be required to comply with employers' normal notice procedures, but employers cannot deny leave based on a failure to follow employers' notice procedures. 	<ul style="list-style-type: none"> • The 30-day requirement would remain, but if employees give less than 30 days' notice, employers could require an explanation as to why 30 days' notice was impracticable. • If 30 days' notice is not possible, employees would have to inform employers the same day the need for leave becomes known. • Employers could deny leave for employees who fail to comply with the employers' call-in and notice procedures.

Subject	Under the Current Regulations:	Under the Proposed Regulations:
<p>Medical Certification</p> <p>29 C.F.R. § 825.305</p>	<ul style="list-style-type: none"> Employers may not directly contact employees' health care providers. 	<ul style="list-style-type: none"> While health care providers still could not disclose employees' medical information without employees' consent, employers could use employees' refusal to provide consent as grounds to question a certification. Employers who intend to reject a medical certification must provide employees in writing with a list of what additional information is needed and provide employees with seven days to cure. Employers can require annual medical certification when serious health condition extends for more than one year.
<p>Fitness for Duty Certification</p> <p>29 C.F.R. § 825.310</p>	<ul style="list-style-type: none"> Employers may implement a uniformly applied policy requiring employees to obtain a fitness for duty certification before returning from FMLA leave. 	<ul style="list-style-type: none"> Fitness for duty certifications would have to specifically address employees' ability to perform essential functions of the position. Employers could require fitness for duty certifications every 30 days for employees taking intermittent leave.
<p>Joint Employer Coverage</p> <p>29 C.F.R. § 825.106</p>	<ul style="list-style-type: none"> Employees who are jointly employed by two employers must be counted by both for purposes of determining employer coverage and employee eligibility under the FMLA, and the secondary employer may be subject to certain other job restoration and compliance requirements. 	<ul style="list-style-type: none"> Clarify that Professional Employer Organizations that perform merely administrative functions (like payroll) are not joint employers.

Subject	Under the Current Regulations:	Under the Proposed Regulations:
<p>Definition of “Eligible” Employee</p> <p>29 C.F.R. § 825.110</p>	<ul style="list-style-type: none"> The regulations are not clear on how to combine nonconsecutive periods of employment to meet the 12-month eligibility requirement. 	<ul style="list-style-type: none"> Employment prior to a continuous break of five years or more need not be counted in the 12-month requirement. Two exceptions to this rule: (1) if the break was the result of military service or (2) if there is a written agreement indicating the employer’s intent to rehire the employee. Clarify that periods of leave count toward the 12-month employment requirement if employees have met the 1,250 working hour minimum. Codify that hours employees would have worked but for USERRA-covered military service count toward the 12 months of employment and 1,250 annual hours of work.
<p>Adult Child with Disability</p> <p>29 C.F.R. § 825.113</p>	<ul style="list-style-type: none"> Rule is slightly unclear regarding when the determination of whether an adult child has a qualifying disability should be made. 	<ul style="list-style-type: none"> The determination of whether an adult child has a qualifying disability should be made at the time leave commences.
<p>Amount of Leave</p> <p>29 C.F.R. § 825.200</p>	<ul style="list-style-type: none"> The fact that a holiday may occur during a week taken as FMLA leave has no effect; the week is counted as a week of FMLA leave. 	<ul style="list-style-type: none"> Clarify that if a holiday falls within a partial week of FMLA leave, the holiday is not counted against an employee’s FMLA leave unless the employee would otherwise have been required to work on the holiday.
<p>Bonuses</p> <p>29 C.F.R. § 825.215</p>	<ul style="list-style-type: none"> Employees who otherwise would have been eligible for bonuses, such as for attendance or production safety, cannot be disqualified from the bonus because of FMLA leave. 	<ul style="list-style-type: none"> Employers could disqualify employees from bonuses for achievement of a goal if employees fail to make the goal because of FMLA leave, so long as employees on other forms of leave are treated in the same way.
<p>Light Duty Positions</p> <p>29 C.F.R. § 825.220</p>	<ul style="list-style-type: none"> Voluntary light duty is counted for purposes of employees’ job restoration rights, but not for purposes of FMLA leave entitlement. 	<ul style="list-style-type: none"> Clarify that employees’ rights to FMLA leave and job reinstatement are not diminished by time spent in a light duty position.

Subject	Under the Current Regulations:	Under the Proposed Regulations:
<p><i>Voluntary Settlement of Past FMLA Claims</i></p> <p>29 C.F.R. § 825.220</p>	<ul style="list-style-type: none"> Regulations provide that employees cannot waive FMLA rights. Some courts (including the Fourth Circuit) have interpreted this to mean that employers and employees cannot settle FMLA claims without DOL or court approval. 	<ul style="list-style-type: none"> Clarify that employers and employees are permitted to voluntarily settle past FMLA claims.

DISCUSSION OF KEY CHANGES IN DOL PROPOSED REGULATIONS

Definition of “Serious Health Condition” (29 C.F.R. § 825.114¹)

An FMLA-qualifying “serious health condition” is currently defined as an illness, injury, impairment or physical or mental condition involving (1) inpatient care or (2) continuing treatment by a health care provider, including a period of incapacity of more than three consecutive calendar days due to the serious health condition, pregnancy or a chronic condition. The regulations further state that although ordinary illnesses such as the common cold and flu are not serious health conditions, they may become so if complications arise.

The current definition of “serious health condition” has led to much confusion among both employers and employees as to what actually constitutes a serious health condition, and whether the regulations should be revised to include a list of qualifying conditions, rather than the objective test currently included. After consideration of several options, the DOL has proposed to retain the current definition of “serious health condition,” with a few minor changes. First, with respect to leave due to a chronic serious health condition, the required visits to a health care provider must occur at least twice a year, as the current requirement that such visits be “periodic” has been found to be vague. Second, if an employee asserts a serious health condition based on a period of incapacity and treatment by a health care provider, the required two visits to the health care provider must occur within 30 days of the beginning of the period of incapacity, absent extenuating circumstances.

Intermittent Leave (29 C.F.R. §§ 825.203 to 825.205)

The current regulations provide that FMLA leave may be taken on an intermittent or reduced schedule basis for certain qualifying reasons, such as when medically necessary, for periods of incapacity due to a chronic serious health condition, or for a serious health condition requiring periodic treatment by a health care provider (e.g., doctors’ appointments or chemotherapy). Leave increments may be limited to the shortest period of time that the employer’s payroll system uses to account for absences, provided it is one hour or less. The current regulations also describe the circumstances in which an employer may transfer an employee to an alternative position to accommodate intermittent leave or a reduced leave schedule. Finally, the current regulations explain how an employer is to determine the amount of leave used when an employee takes intermittent or reduced scheduled leave, and state that only the amount of leave actually taken may be counted towards an employee’s FMLA leave entitlement.

The issue of intermittent leave has been especially troublesome for employers. The DOL acknowledged that it received more comments regarding the increments in which intermittent leave may be taken than on any other issue. Many

¹ Citations refer to the applicable section of the existing regulations, unless otherwise indicated.

commenters expressed frustration with the administrative problems inherent in permitting leave to be taken in the smallest increments the employer's payroll system allows, which may track time to the minute. Concerns were also raised by employers that, because unscheduled intermittent leave may be taken in small increments, it is difficult for employers to address staffing issues and schedule replacement employees for less than an entire shift or workday.

Despite the numerous comments on this issue, however, the DOL has proposed only a few minor changes to the regulations addressing intermittent leave. First, the DOL has proposed to clarify Section 825.203 to state that an employee taking intermittent leave due to medical necessity has a statutory obligation to make a "reasonable effort" to schedule leave so as not to unduly disrupt the employer's operations. Currently, the regulations require only that an employee seeking intermittent leave "attempt" to schedule such leave in that manner. The DOL has also proposed requiring employees taking unforeseeable, intermittent leave to follow the employer's normal call-in procedures. Currently, employees can take the leave and then designate it as FMLA-qualifying leave within two days of the absence. The new proposal allows such an approach only in the case of emergencies. An employee failing to follow the employer's call-in procedures would be subject to whatever discipline is normally provided for such an infraction, and the employer may delay FMLA coverage until the employee complies with the rules.

Substitution of Paid Leave (29 C.F.R. § 825.207)

The current regulations permit employees to substitute accrued paid leave for FMLA leave in certain circumstances, and permit employers to require the same. Specifically, accrued paid vacation, personal or family leave may be substituted for unpaid FMLA leave relating to the birth or adoption of a child, or care of an immediate family member with a serious health condition. Accrued paid vacation, personal or sick leave may be substituted for unpaid FMLA leave needed to care for a family member or the employee's own serious health condition.

The DOL has proposed revising the regulations to clarify that employers are not required to allow the substitution of paid leave for unpaid FMLA leave when inconsistent with their own policies for use of paid leave (e.g., if an employer's normal sick leave rules allow paid leave to be used only for the employee's own illness, the employer would not be required to allow an employee to substitute that sick leave for unpaid FMLA leave when caring for a family member with a serious health condition). Similarly, if the employer has a policy allowing vacation use only in full-day increments, or has an advance notice requirements for using paid leave, those restrictions could be applied to FMLA leave.

The DOL also has proposed adding language requiring that an employer notify an employee eligible for FMLA leave of any additional requirements for the use of paid leave and inform the employee that even if he or she elects not to substitute paid leave, he or she is still entitled to unpaid FMLA leave. Finally, the DOL has proposed deleting language in current Section 825.207(h), which states that when an employer's procedural requirements for taking paid leave are less stringent than the FMLA's requirements, employees cannot be held to the higher FMLA standard. The deletion of this provision would, for example, require employees to comply with the FMLA's notification requirements even where such advance notice for leave is not required under the employer's paid leave policies.

Employer Notice Requirements (29 C.F.R. §§ 825.300, 825.301)

Perhaps the most significant of the DOL's proposed changes are its proposals with respect to the FMLA's notice requirements by employers. Currently, the regulations require that employers provide employees with three kinds of FMLA-related notice: (1) "general" notice, including posting of general FMLA information for employees and applicants; (2) "designation" notice, which is written notice to an employee that his or her requested leave is being

designated as FMLA leave within a reasonable time after the employee provides notice of the need for leave – within one to two business days, if feasible – including information about the employee’s obligations, such as any requirements to furnish medical certification or substitute paid for unpaid leave; and (3) “eligibility” notice, notifying an employee of his or her eligibility to take FMLA leave, which must be conveyed by the employer to the employee within two business days after the employee requests leave or the employer acquires knowledge that the leave may be for an FMLA-qualifying reason. The current regulations also (in most situations) prohibit employers from designating leave as FMLA leave retroactively.

The DOL has proposed to restructure the regulations regarding employer notice. In recognition that employers may not have enough information to know whether leave is properly designated as FMLA leave until the employee provides additional information, the DOL has proposed extending the time to provide the designation notice from two business days to five business days, as well as requiring that the designation notice also contain information, if possible, regarding the amount of time to be designated as FMLA leave. Finally, when future leave will be needed but the exact duration is unknown, the employer must inform the employee every 30 days that the leave has been designated as FMLA leave, and inform the employee of the amount so designated within that 30-day period. The DOL has also proposed that the general FMLA notice requirement may be satisfied through electronic posting, such as on a company Web page, and that it must be distributed annually if not contained in an employee handbook. As with the designation notice requirement, the DOL has proposed extending the time for the employer to provide the eligibility notice from two to five business days. The DOL has proposed additional information that employers must provide when providing the eligibility notice, including the reasons why an employee is not eligible for leave, if applicable.

Finally, the DOL has proposed to revise the regulations prohibiting the retroactive designation of FMLA leave to conform to the Supreme Court’s decision in *Ragsdale v. Wolverine World Wide, Inc.*, which held that such a “categorical” penalty for failure to appropriately designate leave was inconsistent with the act, absent a showing of harm by the employee. In *Ragsdale*, the Supreme Court invalidated the penalty provision in 29 C.F.R. § 825.700(a), which provides that if an employer does not designate leave as FMLA leave, the leave does not count against an employee’s FMLA entitlement, concluding that in some circumstances such a categorical penalty provision required employees to provide employers with more than the FMLA-guaranteed twelve weeks of leave. Under the proposed regulations, retroactive designation by the employer may occur, but if the employer fails to timely designate and the employee can establish harm resulting therefrom, a remedy may be available. The proposed regulations also allow the employer and employee mutually to retroactively designate leave as FMLA leave.

Employee Notice Requirements (29 C.F.R. § 825.302)

Under the current regulations, employees must provide at least 30 days’ notice when the need for leave is foreseeable. If that is not possible, employees must give notice “as soon as practicable,” defined by the regulations as ordinarily meaning at least verbal notice to the employer within one to two business days of when the need for leave becomes known to the employee. Employees taking unforeseeable leave must notify their employers as soon as practicable. Employees may be required to comply with employers’ normal notice procedures, though leave cannot be denied or delayed for failure to do so, and employees are required to plan treatment so as to not unduly interrupt the employer’s operations.

The DOL has proposed to retain the 30-day notice time frame, but would require that when an employee gives less than 30 days’ notice, the employee must respond to a request from the employer to explain why it was not practicable for him or her to provide the 30 days’ notice. The DOL has also proposed to delete the “one to two business days” time frame,

instead clarifying that an employee is required to provide notice of the need for leave either the same day or the next business day, if the employee becomes aware of the need for leave after work hours. The DOL has proposed to clarify what information an employee must provide when informing his or her employer of the need for leave; specifically, that the employee is unable to perform the functions of the job (or a covered family member is unable to participate in regular daily activities), the anticipated duration of the absence and whether the employee (or family member) intends to visit a health care provider or is receiving continuing treatment. Finally, the DOL has proposed to eliminate the language stating that leave cannot be denied or delayed for failure to comply with employers' normal notice and call-in procedures. Moreover, the DOL has proposed to clarify that, with respect to unforeseeable leave, employees are required to notify their employers promptly, providing sufficient information to place the employer on notice that the absence may be FMLA-protected.

Medical Certification (29 C.F.R. § 825.305)

Currently, when leave is foreseeable and the requisite 30-days' notice has been provided, an employee is required to provide medical certification before the leave begins, or, if that is not possible, the employee must be given at least 15 days to do so, unless that would not be practicable, despite the employee's diligent efforts. Under the current regulations, without the employee's permission, employers may not contact the employee's health care provider directly.

The DOL has proposed to require that employers rejecting a medical certification as incomplete or insufficient provide the employee in writing with a list of what additional information is necessary, and provide the employee with at least seven calendar days to cure the deficiency. The DOL's proposal would also require annual medical certifications where the serious health condition extends for more than one year. The proposed regulations clarify that any contact between the employer and the employee's health care provider must comply with the Health Insurance Portability and Accountability Act (HIPAA). Under the proposed regulations, if the employer has informed the employee in writing that his or her medical certification is insufficient, the employee may be required to provide his or her health care provider with a written authorization allowing the employer to contact the health care provider directly for authentication or clarification of the medical certification. As is the case currently, employers will not be able to ask the health care provider for information beyond that contained on the certification form.

Additionally, the DOL has proposed a revised medical certification form, which would allow employers to list the employee's essential job functions (if taking leave for the employee's own serious health condition) and ask the employee's health care provider which of those functions the employee is unable to perform, and permits the health care provider to include a diagnosis.

Fitness for Duty Certification (29 C.F.R. § 825.310)

The proposed regulations clarify that the fitness for duty certification must indicate that the employee is able to return to work, specifically addressing the employee's ability to perform the essential functions of the position, if the employer has notified the employee of the list of essential functions and that this information will be required. The proposed regulations also would allow employers to require a fitness for duty certification every 30 days for an employee taking intermittent or reduced schedule FMLA leave, if there are reasonable safety concerns based on the condition for which leave was taken regarding the employee's ability to perform his or her duties. Currently, employers are not permitted to require a fitness for duty certification for an employee returning from intermittent leave.

Joint Employer Coverage (29 C.F.R. § 825.106)

Under the current regulations, employees who are jointly employed by two employers must be counted by both employers for purposes of determining employer coverage and employee eligibility under the FMLA, and the secondary employer may be subject to certain other job restoration and compliance requirements as well.

Due to confusion that has arisen regarding the application of Section 825.106 to certain employee leasing arrangements, the DOL has proposed that § 825.106 be amended to clarify that Professional Employer Organizations (PEOs) “that contract with client employers merely to perform administrative functions, including payroll, benefits, regulatory paperwork, and updating employment policies, are not joint employers with their clients.” However, if the PEOs have the right to hire, fire, assign, direct, supervise or control the employees’ work, they would be considered a joint employer.

Definition of “Eligible” Employee (29 C.F.R. § 825.110)

Currently, the regulations provide that in order to be eligible for FMLA leave, an employee must have been (1) employed by an employer for at least 12 months, (2) employed for at least 1,250 hours of service during the 12 months preceding the leave and (3) employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite.

Disputes have arisen over how to combine nonconsecutive periods of employment to meet the 12 months of employment eligibility requirement. Accordingly, the DOL has proposed to change § 825.110 to provide that “although the 12 months of employment need not be consecutive, employment prior to a continuous break in service of five years or more need not be counted.” The DOL proposes two exceptions to this general rule, including when the break in service arises from the employee’s fulfillment of military obligations or from a period of approved absence or unpaid leave, such as for education or child-rearing purposes, where a written agreement indicating the employer’s intent to rehire the employee exists. Moreover, because the FMLA has only a three-year recordkeeping requirement, if an employee is relying on a period of employment predating the employer’s records, the employee will bear the burden of providing some proof of that prior employment.

The DOL has also proposed language to clarify that periods of leave do count toward the 12-month employment requirement. Thus, if an employee has worked 1,250 hours in the past 12 months, and is on leave at the time he or she meets the 12-month employment eligibility requirement, the period of leave after that requirement is met may be FMLA-protected.

The DOL seeks to codify the rule that the hours an employee would have worked but for USERRA-covered military service count toward the 12 months of employment and 1,250 annual hours of work.

Definition of Spouse, Parent, Son or Daughter (29 C.F.R. § 825.113)

The DOL has proposed one substantive addition to the definition of “son” or “daughter,” in order to clarify that the determination of whether an adult child has a qualifying disability should be made at the time leave is to commence, in order to eliminate confusion about coverage.

Amount of Leave (29 C.F.R. § 825.200)

Currently, for calculating the amount of leave used by an employee, the fact that a holiday may occur within the week of leave taken has no effect. The DOL has proposed no change to this manner of calculation, however, it has proposed

to add language clarifying that when an employee is taking less than a full week of FMLA leave, and a holiday falls within that partial week, the holiday is not counted against an employee's FMLA leave entitlement unless the employee would otherwise have been required to report to work that day.

Equivalent Position, Bonuses (29 C.F.R. 825.215)

The current section addresses what constitutes an "equivalent position" for purposes of reinstatement, and also addresses whether employees who take FMLA leave are entitled to certain bonuses they may otherwise have received. Specifically, for bonuses for such things as attendance and production, the current regulations state that an employee who otherwise would have been eligible for that bonus before taking FMLA leave cannot be disqualified because of taking leave. Much debate has arisen regarding the impact of this section on employer incentive programs.

The DOL has proposed to change this section to allow an employer to disqualify an employee from a bonus or award given for the achievement of a goal, such as perfect attendance, where the employee fails to achieve that goal due to an FMLA absence. An employer cannot, however, disqualify only those individuals on FMLA leave, while allowing employees on other forms of leave to receive such an award.

Light Duty Positions (29 C.F.R. § 825.220)

The current regulations provide that voluntary light duty is counted for purposes of an employee's job restoration rights, but not for purposes of FMLA leave entitlement. The DOL has proposed to revise this section to ensure that an employee's right to FMLA leave and job reinstatement is not diminished by time spent in a light duty position, but invites comment on the issue of whether the deletion of this language may negatively impact an employee's ability to return to his or her original position from a light duty assignment.

Voluntary Settlement of Past FMLA Claims (29 C.F.R. § 825.220)

The DOL has also proposed to clarify in this section that employees and employers are permitted to voluntarily agree to the settlement of past FMLA claims. The Fourth Circuit in *Taylor v. Progress Energy*, held that the DOL regulations prevent employees and employers from independently settling past claims for FMLA violations without either DOL or court approval. Other circuits have disagreed. See, e.g., *Faris v. Williams WPC-I, Inc.*, 332 F.3d 316 (5th Cir. 2003). In light of the 4th Circuit's decision in *Taylor*, the DOL proposes to make explicit that employees and employers should be able to voluntarily settle past FMLA claims without DOL or court approval.

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