

Present and Future Changes to FMLA

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In 1993, the Family and Medical Leave Act (FMLA) was signed into law, providing eligible employees with a qualified statutory right to unpaid leave to care for themselves or a family member. During the ensuing 15 years, FMLA has become a familiar, if imperfect, aspect of the nation's workplaces.

Workers enjoy a uniform leave entitlement, but complain the conditions for leave are too restrictive and that unpaid leave is often too "expensive" to actually take full advantage. Employers, on the other hand, must navigate frustrating, unforeseen administrative scenarios that FMLA's vague statutory and regulatory provisions fail to adequately address. Meanwhile, the concept of "work-life balance" continues to be popular, earning the attention of both the media and politicians.

With these concepts and concerns in mind, the federal government has recently begun refining FMLA to respond to the concerns of workers and employers.

First, in January 2008, President Bush signed into law the National Defense Authorization Act for 2008 (NDAA '08),

which, among other things, expands FMLA to provide leave to servicemen and women and their families in certain circumstances.

Second, in February 2008, the U.S. Department of Labor introduced a set of proposed changes to its regulations under FMLA.

And most recently, in June 2008, U.S. Senator Chris Dodd introduced a bill in Congress that would expand FMLA to include up to eight weeks of paid leave.

This article will briefly outline the core provisions of FMLA, then address these actual and proposed changes to the Act. Hopefully, this short review will provide FMLA practitioners with a starting point for further research and review.

An Overview

FMLA provides eligible employees with up to 12 "workweeks" of unpaid, job-protected leave per year and requires group health benefits to be maintained during the leave as if employees continued working instead of taking leave. To be considered eligible for FMLA

leave, an employee must perform a threshold amount of work for a "covered" employer. A "covered" employer includes government entities and private sector employers who employ 50 or more employees for at least 20 workweeks in the current or preceding calendar year.

A covered employer must grant an eligible employee up to 12 workweeks of unpaid leave for the birth and care of a newborn child, the placement and care of an adopted child, the care of an immediate family member with a serious health condition or the employee's own serious health condition. While most employees choose to take this leave in week-long increments, FMLA also permits employees to take this leave on an intermittent basis or to work a reduced schedule under certain circumstances.

This "intermittent leave" provision has caused employers to spend considerable time and effort changing schedules, modifying payroll and confirming employee medical issues on short notice. While FMLA only requires covered employers to offer unpaid leave, if an employer does offer paid leave, it may require an employee to use that paid leave concurrently with his or her FMLA leave.

FMLA requires covered employers to provide their employees with various written notices about their FMLA rights; in turn, eligible employees must provide prompt notice to their employers of their intent to take FMLA leave and must also provide timely medical certification for the basis of their leave.

Upon return from leave, FMLA guarantees most employees that they will be returned to an equivalent, if not identical, position. Employers may not count FMLA leave towards "no fault" attendance violations or otherwise use that leave against the applicable employee. Finally, FMLA bars employers from interfering or denying employees leave and forbids retaliation against employees in the terms and conditions of their employment for participating in, or opposing, acts protected by FMLA.

Extending Leave for Military Families

NDAA '08 expands FMLA in two important ways for military families:

First, eligible employees may now take up to 26 workweeks of unpaid leave to care for a "spouse, son, daughter, parent or next of kin" who is a member of the Armed Forces, including the National Guard and Reserves, when that family member is undergoing medical treatment, recuperation or therapy for a serious injury or illness. While this leave is a one-time entitlement, and does not reset

after each year, it amounts to a half-year of leave available to address a serious, and hopefully unique, family and medical care scenario;

Second, NDAA '08 permits an eligible employee to take FMLA leave for "any qualifying exigency...arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty...in the Armed Forces in support of a contingency operation." By its express terms, this provision of NDAA '08 is not effective until the Secretary of Labor issues final regulations defining "any qualifying exigency." Until the Department of Labor works to promulgate these regulations, however, the government encourages covered employers to read and implement this section in good faith and provide this emergency leave to military families.

An Attempt at Clarity

On February 11, 2008, the Department of Labor published a "Notice of Proposed Rulemaking" to update its regulations under FMLA. The intent of these proposed regulations was not to substantively contract or expand leave rights under FMLA, but rather to provide clarity for both workers and employers about the precise scope of the law. The proposed rules reflect the wisdom accumulated by the Department of Labor after 15 years of enforcing FMLA, as well as over 15,000 comments invited by the government about the strengths and weaknesses of FMLA's current statutory and regulatory provisions.

The proposed regulations cover almost every aspect of the FMLA statutory scheme and purport to definitively answer questions that have long troubled human resources professionals.

For example, the proposed regulations permit employers to deny a "perfect attendance" award to employees who take FMLA leave (and are thus absent), so long as it treats employees taking non-FMLA leave in an identical way. The proposed regulations also make clear that time spent by an employee performing "light duty" work as a result of a serious health condition does not count against an employee's FMLA leave entitlement.

Other proposed regulations address the notice obligations FMLA places on employers and employees alike. Employers would have increased notice requirements, but would also have more time to determine whether an employee is, in fact, trying to avail him or herself to protected leave. Employees, on

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the other hand, would be expected to follow their employer's usual and customary call-in procedures for reporting a FMLA-related absence. This proposed provision addresses one of employers' most serious complaints about FMLA: the chaos caused by unscheduled FMLA-protected absences and the lack of clear avenues available to employers to address that chaos.

These examples detail only a few of the Department of Labor's proposed regulations. To learn more, go to the Department's website at www.dol.gov.

The Next Frontier: Paid Leave?

These statutory and regulatory changes, however, are merely adjustments to FMLA's basic unpaid leave entitlement. After 15 years, some in Congress are calling for more serious, substantive changes to FMLA.

On June 21, 2007, U.S. Senator and Louisville School of Law graduate Chris Dodd introduced a bill that would provide up to eight weeks of *paid* leave for employees otherwise eligible under FMLA. This bill, called the "Family Leave Insurance Act of 2007," would create a new "Family Leave Insurance Fund" from which benefits would be paid. This fund would be sustained by employee payroll contributions, employers and the federal government.

Senator Dodd's bill would require employees to pay into the fund for the same employer for 12 months before becoming eligible for paid employment leave. The amount of pay an employee would receive while on paid FMLA leave would be "tiered" based on wages, with lower income earners receiving a higher percentage of their pay than higher income earners. Employers with over 50 employees would be required to participate in the fund, but smaller businesses could voluntarily participate at a

lower contribution rate.

In support of his bill, Senator Dodd points to the divide between America and the 200-plus countries that provide some kind of paid leave and the difficulty of balancing work demands with family responsibilities. "No one should have to choose between the job they need and the family they love and I deeply regret that today many people are forced to make these types of decisions," Dodd said in a recent press release.

Opponents cite the burden the proposed bill would place on American businesses' ability to compete in a global marketplace and argue that Dodd's bill would amount to another permanent, costly government entitlement program that could be extremely vulnerable to abuse.

With a Democratic-controlled Congress and the possibility of a Democratic presidential victory in November, Senator Dodd's bill, and other similar bills, will likely appear in the news with greater frequency.

Conclusion

Like most employment laws, FMLA has required minor adjustments to adapt to changing times and maintain support as a workable legislative scheme. FMLA will also continue to be a battleground of further legislative action. FMLA practitioners would be well served, then, to become familiar with the Department of Labor's proposed (and final) regulations and to keep a watchful eye on the headlines.

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To learn more about the Department of Labor's proposed regulations, go to the Department's website at www.dol.gov.