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Big changes in the Family and Medical Leave Act

BY R. SCOTT DELUCA

Daily Record Columnist

Even at this early date, 2008 already has seen significant statutory changes and proposed regulatory changes to the Family and Medical Leave Act (FMLA).

Employers should ensure they are in compliance with all of the changes already implemented by Congress and President George W. Bush, and stay apprised of regulatory changes proposed by the U.S. Department of Labor.

Amendments to the Act

On Jan. 28, the National Defense Authorization Act was signed into federal law. While this alone does not seem noteworthy, there is an important provision tucked in that modifies the FMLA. Any employer with more than 50 employees must now provide two additional types of leave.

First, an employee with a spouse, son, daughter or parent on active duty in the armed forces shall be entitled to 12 workweeks of FMLA leave due to "any qualifying exigency," as that term will be defined by regulations to be issued by the Department of Labor. The Department of Labor has advised that the provision allowing leave for a qualifying exigency is not effective until final regulations are issued by that department. Accordingly, employers are not yet required to provide this type of leave.

The second leave now authorized by the FMLA permits an employee who is the spouse, son, daughter, parent or next of kin of a covered service member to take up to 26 weeks of leave to care for the service member — known as a "service member family leave." The service member family leave is unique in the FMLA in two respects. It applies not only to an employee who is a spouse, son, daughter or parent, but also to the "next of kin" of a covered service member, and it provides up to 26 workweeks of leave per year (more than double the normal amount of leave available under the FMLA).

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R. SCOTT DELUCA

Importantly, the new provision concerning service member family leave became effective upon the Defense Authorization Act's signing (Jan. 28), therefore employers should immediately move to ensure good faith compliance with the new provision.

Proposed amendments to the Department of Labor's regulations

In addition to statutory amendments to the FMLA, the Department of Labor issued proposed revisions to FMLA regulations on Feb. 11. The department purportedly took into account all of its studies of the FMLA conducted throughout the nearly 15 years since the law was enacted, numerous judicial decisions (including two U.S. Supreme Court decisions), and public comments the department received in response to a December 2006 request for information. The proposed regulations may be

viewed at the Department of Labor's Web site, www.dol.gov/esa/whd/fmla/FedRegNPRM.pdf.

The proposed regulations address topics too numerous to discuss in one article; however, some highlights include:

- ♦ Employee eligibility — An employer does not need to count employment that occurred prior to a break in service more than five years before the leave begins (for purposes of the 12 months of service requirement).

- ♦ Serious health condition — A serious health condition involving incapacity and treatment would require two visits with a health care provider occur within 30 days of the beginning of the period of incapacity (absent extenuating circumstances).

- ♦ Employer notice of FMLA eligibility — An employer would have five business days to provide an employee requesting a leave of absence with an eligibility notice (increased from two business days). Importantly, the department also provided a prototype form for this notification.

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cation, which would provide employees with the additional information needed in order for their absence to be designated as leave under the FMLA.

♦ Designation of FMLA leave — Once an employer has enough information to determine whether to designate a leave of absence as FMLA leave, a designation notice must be provided within five business days of making the determination (up from two business days). As with the eligibility notice, the department provided a prototype form for the designation notice.

♦ Employee notice to employer — The requirement for employee notification to the employer of the need for leave as soon as practical remains, although the proposed changes strongly suggest an employee must provide notice to the employer on the date which information supporting the need for leave is obtained (or the next business day).

♦ Medical certification — If an employee provides a deficient medical certification, the employer must provide an opportunity to cure that deficiency. If the deficiency is not cured, the employer may contact the employee's

health care provider directly for "clarification and authentication" of the medical certification (unlike the prior rule that prohibited employers from directly contacting an employee's health care provider).

♦ Substitution of paid leave — The proposed regulations would permit an employer and employee to agree to the substitution of paid leave during FMLA leave when paid disability benefits do not provide the employee with regular salary, although it appears a similar rule was not included for FMLA leave that runs concurrently with a workers' compensation absence.

It is important to keep in mind that these, and all of the other changes in the regulations, are merely proposed modifications. The Department of Labor is accepting comments concerning these proposals until April 11. After that deadline, it is expected the department will prepare final regulations. In the meantime, employers should continue to follow the amended FMLA statute and existing FMLA regulations.

R. Scott DeLuca is senior counsel in Underberg & Kessler's litigation and employment law practice groups. He concentrates his practice in the areas of employment discrimination and litigation, labor relations and labor arbitration matters.