

## **Summary of the Family and Medical Leave Act Regulations: A Report on the Department of Labor's Request for Information**

On June 27, 2007, the Department of Labor ("DOL") released the *Family and Medical Leave Act Regulations: A Report on the Department of Labor's Request for Information* ("the Report"). In December 2006, the Department issued a Request for Information ("RFI") on the effectiveness of the Family and Medical Leave Act ("FMLA") regulations. The Department received more than 15,000 comments in response to the RFI and summarized the comments in its Report. The Report was published in the *Federal Register* and highlighted both employer and employee concerns with the FMLA.

While the employer groups focused on concerns in administering the FMLA regulations, the employee groups recommended that the FMLA should be expanded to provide paid leave, more time off, and coverage for siblings and grandparents. Here is a summary of the issues that DOL considered to be the most important, especially for the employer community.

### Serious Health Condition.

The comments indicated that the definition of a serious health condition "continues to be a source of concern." Specifically, many employer comments addressed the period of incapacity in determining whether or not a condition is considered *serious*. The Report mentioned employer recommendations to increase the minimum period of incapacity from "more than three consecutive calendar days" to five business days or seven consecutive calendar days. Other employers recommended "10 days or more" and "ten (10) consecutive work days as defined by an individual's work schedule." In addition to the employer community, the DOL also highlighted how the current definition of a serious health condition creates confusion for physicians.

Although the employer and physician groups expressed concerns with the current definition, the employees urged the DOL to retain the current definition of a serious health condition. The employee groups argued that Congress intended for the definition to be flexible, and that any additional requirement would inevitably exclude serious medical conditions from the FMLA.

### Unscheduled Intermittent Leave.

The DOL received more comments on unscheduled, intermittent leave than any other FMLA issue. The use of FMLA leave has continued to increase, especially for the use of intermittent leave for chronic serious health conditions. The Report noted that while intermittent leave is important for employees with conditions that flare unpredictably, it presents many serious

problems for employers concerned with scheduling, attendance, productivity, and co-worker morale.

The Report highlighted the employers' concerns regarding employees who provide little or no notice prior to taking FMLA leave, putting employers in a difficult position. The Report also noted employer concerns that employees have expanded FMLA protections to the point of abuse as a result of the current regulatory interpretation of a "serious health condition" and the number of chronic conditions that are covered.

The employee community addressed the need for unscheduled intermittent leave, and cited examples of caring for a daughter who suffered from unpredictable asthma attacks, a mother recovering from a stroke, and a father in the final stages of terminal cancer.

#### Medical Certification and Verification Process.

The DOL noted that many employer comments indicated that the DOL should improve the current medical certification process and revise the optional model certification form (WH-380). Employers expressed frustration at being unable to speak directly with the employee's health care provider, and argued that greater communication would facilitate quicker decisions about FMLA coverage.

The Report referenced the employer community's recommendation to clarify that a medical certification form is not considered complete if it does not provide meaningful responses to all questions. The Report also referenced employers' concerns that the current form does not require a health care provider to certify the medical necessity for intermittent leave or reduced schedule.

Some employees expressed frustrations with the medical certification process, indicating that employers repeatedly reject certifications as incomplete without specifying what additional information is necessary. However, some employee groups suggested that there was no need to change the current certification process.