



February 12, 2008

*Keller and Heckman LLP
OSHA. EMPLOYMENT. LABOR.*

DOL Proposes Changes To Family Medical Leave Act Regulations

Manesh K. Rath

Yesterday, the Department of Labor published a Notice of



Proposed Rulemaking (NPRM) for revisions to its regulations under the Family and Medical Leave Act.

Background

Congress enacted the Family and Medical Leave Act in 1993. The Department of Labor published its regulations under the Act in 1995. In 2002, the U.S. Supreme Court issued an opinion in *Ragsdale v. Wolverine World Wide, Inc.* striking down a DOL regulation under the Act. For the past few years, the DOL has stated its intent to revise its regulations as a result of the *Wolverine* decision. Consequent to making the one change required under *Wolverine*, the DOL has proposed several other significant changes to the FMLA regulations.

What The NPRM Includes

The DOL's lengthy NPRM proposes a number of changes, including the following:

Despite the U.S. Supreme Court's decision in *Wolverine*, the proposed new rule will increase the employer's notice obligations, requiring that an employer provide

written notice that an employee is eligible for FMLA leave and another written notice that formally designates leave as FMLA leave. A third notice informs employees of consequences to the employee for failing to properly notify the employer of a need for FMLA leave. The DOL intends to address the Court's concerns in *Wolverine* by permitting designation of leave as FMLA leave retroactively.

In addition, the DOL has proposed a new, revised FMLA medical certification form, including a section for the health care provider to provide details about symptoms, diagnosis and medications. In addition, it requires more information for intermittent leave requests.

The DOL proposes that common ailments such as the common cold, flu, fevers, and headaches, which are not presently covered under the FMLA as "serious health conditions" could be covered under the Act if they otherwise meet the definition for "serious health condition."

The DOL further proposed to clarify that chronic conditions should qualify for FMLA leave, provided that persons with chronic serious health conditions requiring periodic treatment must visit their health care provider at least twice per year.

In addition, the DOL proposed that an employer must notify an employee, at the time leave is

taken, of the employer's policy relating to the use of paid leave. The employer must further inform the employee that he remains entitled to unpaid FMLA leave even if the employee chooses not to follow the employee's paid leave policies.

The DOL also proposes to allow an employer to disqualify persons on FMLA leave from attendance bonus plans.

In one significant proposal which appears to address issues raised by the Fourth Circuit in *Taylor v. Progress Energy*, the DOL now proposes that employers and employees may voluntarily settle past claims without first obtaining DOL or court approval. Thus, the existing regulation prohibiting employers to seek waiver of employee rights under the FMLA would appear only to apply to a prospective waiver.

What Employers Should Do

The DOL seeks comments within sixty days, or by April 11, 2008. Employers should, either on their own or through employer associations and trade associations, submit comments to the DOL.

Also, employers should urge their associations to participate. In addition, employers should provide specific feedback to their associations to assist in preparing comments.

Please feel free to contact us with questions. ♦