



DOL PROPOSES FMLA REGULATIONS UPDATE

Mid-February, the United States Department of Labor issued a proposal which would revise many aspects of the Family Medical Leave Act (FMLA). The proposed changes include notice requirements, medical certifications, the definition of "continuing treatment" for a serious health condition, fitness for duty, and more.

Here is a brief synopsis on the notice and medical certification issues contained in the lengthy proposal:

Medical certification. Because of the administrative burdens created by the FMLA, the DOL proposes allowing employers themselves contact healthcare providers directly, rather than through the employer's healthcare provider, to authenticate or clarify a medical certification.

Employee notice. The DOL's proposal covers many employee notice issues. By way of example, it addresses what constitutes "timely notice" of an employee's need to take leave in cases when the employee becomes aware of that need less than 30 days in advance. The proposal states: "Absent emergency situations, where an employee becomes aware of a need for FMLA leave less than 30 days in advance, the department expects that it will be practicable for the employee to provide notice of the need for leave either the same day (if the employee becomes aware of the need for leave during work hours) or the next business day (if the employee becomes aware of the need for leave after work hours)."

The proposal also covers leave request procedures. According to the proposed rules, "absent unusual circumstances, employees may be required to follow established call-in procedures (except one that imposes a more stringent timing requirement than the regulations provide), and failure to properly no-

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tify employers of absences may cause a delay or denial of FMLA protections. Unusual circumstances would include situations such as when an employee is hospitalized and his/her spouse calls the supervisor to report the absence, unaware that the attendance policy requires that the human resources department be called instead of the supervisor.”

Employer notice. The proposed rules would require employers to provide employees with an annual notice of FMLA rights, by way of the employee handbook, or via paper or electronic distribution. Also, employers would have five business days (rather than the two provided under current law) to notify an employee of eligibility for FMLA leave when the employee requests leave or the employer otherwise learns that an employee's leave may be for a FMLA-qualifying reason.

The DOL invites public comments on the proposal, no later than April 11, 2008. The proposal is expected to be finalized sometime this year. For more information and to read the regulations, go to the [DOL's website](#).

The National Defense Authorization Act for FY 2008 (NDAA), amends the Family and Medical Leave Act of 1993 (FMLA) to permit a “spouse, son, daughter, parent, or next of kin” to take up to 26 workweeks 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 other-

wise on the temporary disability retired list, for a serious injury or illness.”

The provisions in the NDAA providing this leave became effective as of the date of the President’s signing—January 28, 2008. The Department of Labor is working on more comprehensive guidance regarding rights and obligations under this new law.

As mentioned in this Firm’s most recent Client Alert (available on the website), the NDAA also permits an employee to take FMLA leave for “any qualifying exigency (as the Secretary [of Labor] shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter, or the employee duty (or has fulfilled of an im-call or order duty) in the Forces in support of a contingency. By its express provision of is not effective until the Secretary issues final regulations defining “any qualifying exigency.” DOL is expeditiously preparing such regulations.



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The Department is also seeking public comment on issues to be addressed in final regulations regarding military family leave, by April 11, 2008, as well. For more information and to read the regulations, go to the [DOL's website](#).

Take Away Tip

While the DOL is developing the more detailed rules under the NDAA, employers to act in good faith in providing leave under the new legislation. Because the NDAA amends the FMLA, FMLA-type procedures should be used as may be appropriate (for example, procedures regarding substitution of paid leave and notice).

CELL PHONE RESTRICTIONS FOR TEENAGE DRIVERS

As reminded in this Firm's February Legal Update, July 1, 2008, marks the effective date for the limitation on use of cellular phones while driving. Specifically, SB 1613, which amended the Vehicle Code, makes it illegal to operate a motor vehicle while using a wireless phone unless it is being used with a hands-free device. Senate Bill 33 imposes a more stringent restriction on teenagers. If your business employs teenagers, be mindful of this added restriction. Specifically, on July 1, 2008, individuals under the age of eighteen, will be prohibited from driving a vehicle while using a mobile phone, *even if it is being used with a hands-free device*. This law also makes it illegal for teenagers to use any other type of mobile service, such as two-way messaging, pagers, broadband personal communication devices, or laptop computers with mobile data access.

Similar to one of the exceptions afforded under SB 1613, the prohibition under SB 33 does not apply where the teenager requires the use of the cell phone in order to place a call for emergency reasons, such as to health care providers, law enforcement personnel. Violations of this law will result in an initial fine of \$20, and \$50 for each subsequent violation.



Take Away Tip

Employers who utilize teenage labor should not wait until July 1, 2008, to develop and implement employee policies restricting use of cellular phones by employees while operating vehicles for business related purposes or during business hours. For assistance with developing such policies, contact Elizabeth Koumas.

THE HIDDEN DANGERS OF ELECTRONICALLY STORED INFORMATION



Almost every employer stores information electronically, utilizing programs such as Microsoft Word, Excel, and some variety of e-mail. Without being directed, employees frequently delete previously stored information for a variety of reasons, including to make room for new files or as a matter of policy. However, with the rise of electronic discovery, electronically stored files (and the unseen *metadata* associated with them) are becoming more pivotal to the outcome of legal claims. In the legal industry, metadata is generally defined as the information describing the history, tracking or management of an electronic document. There are three general categories of metadata: *file system, e-mail and document*.

File System metadata tracks when an electronic file was created, last modified, and by whom, the folder location in which it can be found (or has been stored) and sometimes even when the file was last opened and/or printed. **E-Mail** metadata (a sub-category of file system metadata) can reveal a sender's domain, the route a message has traveled, and where delays may have been experienced between sending and receiving. **Document** metadata consists of prior content of an electronic file, such as text or inserted comments, which can occur from copying and pasting, and/or mishandling of tracked changes. In this day and age, litigating employment law claims can often rely heavily on employer created memos, policies, and employee generated e-mails, all of which are generated through electronically stored files. Because of the metadata associated with every one of these types of files, information created, deleted,

transmitted or relocated through the use of a computer system can be recovered, with the aid of highly skilled experts which are increasingly being retained in employment law cases. As a result, metadata can implicate legal, procedural, technological and ethical obligations. Not all metadata contains harmful or confidential information. However, when metadata does, disclosure can jeopardize a party's case.

PRACTICE TIP: Employers are reminded to be careful in the use of electronically stored information, and should train employees in the proper use of such company property, due to the far reaching legal implications that can be associated with the embedded information contained on electronically stored files.

CALIFORNIA REFORM MEASURE DIES IN SENATE

The massive healthcare reform proposal that was brokered between Gov. Schwarzenegger and the California legislature has died in the Senate Health Committee, which voted overwhelmingly not to move the bill forward. Key reasons for the committee's move included the state's huge budget deficit and the lack of available funding for the bill's provisions. The measure would have overhauled the state's healthcare system by requiring all Californians to have health insurance coverage—and a hefty portion of the ambitious program's funding would have come from employers. Despite this setback, the governor has already announced that he plans to regroup and push through a healthcare reform measure.



HIPAA EXTENDED THROUGH 2010

Assembly Bill 1302 has extended California's Health Insurance Portability and Accountability Implementation Act through 2010. Prior to this bill, the obligations imposed under the law had been set to expire on January 1, 2008.

FUTURE SEMINARS

EMPLOYMENT LAW: FROM A TO Z

Elizabeth Koumas, along with another knowledgeable attorney, will present a day long training seminar on Employment Law, covering topics from recruiting to termination.

Date: June 24, 2008 **Time:** 8:30 a.m. to 4:30 p.m. **Location:** TBD

Topics Include:

- Human Resource Records and Documents
- Hiring Policies and Practices
- Overview of Family Medical Leaves
- Harassment Training Rules
- Performance, Discipline, Termination and Recommended Documents
- Essential Wage and Hour Practices and Benefits

LEAVES OF ABSENCE

Elizabeth Koumas has presented this valuable seminar for the past 5 years, and continuing.

Date: November 13, 2008 **Time:** 8:30 a.m. to 4:30 p.m. **Location:** TBD

Topics Include:

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|--------|-------------------------------------|
| * CFRA | * Workers Compensation Leaves |
| * FMLA | * Disability Related Leaves |
| * PDL | * Other Statutory Leaves of Absence |

These seminars will be presented through Lorman Educational Service. For complete agenda, and for registration information, contact Elizabeth J. Koumas.



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