

Client Alert

A report
for clients
and friends
of the Firm February 2008

DOL Issues Proposed Revised FMLA Regulations and Expanded FMLA Leave to Family of Military Servicemembers

On February 11, 2008, the U.S. Department of Labor (“DOL”) published a proposed rule suggesting a variety of changes to its regulations under the Family and Medical Leave Act (“FMLA” or “the Act”), including revisions to rules addressing: what constitutes a serious health condition; substitution of paid leave; notice requirements for employers and employees; and the medical certification process. The DOL’s proposals follow its December 2006 Request for Information (the “Request”), pursuant to which the DOL solicited public comments to assist in its reassessment of the effectiveness of the current regulations. Comments on the DOL’s proposed regulations are due by April 11, 2008. This Alert summarizes the most significant changes proposed by the DOL.

The DOL’s proposed revisions to the FMLA follow on the heels of the enactment of the National Defense Authorization Act (“NDAA”) for 2008, which President Bush signed into law on January 28, 2008. Generally, the NDAA provides leave to family members of covered servicemembers to care for his/her relative injured during active duty. The NDAA is described in more detail in this Client Alert.

Proskauer will be reviewing the proposed FMLA regulations in more detail over the next few weeks.

We welcome any inquiries regarding the proposed changes. In addition, we will be preparing comments on behalf of the firm and its clients and welcome your suggestions and participation in this effort.

Proposed Revisions to the FMLA Regulations

Joint Employer Coverage (§ 825.106)

- This section of the current regulations governs employer coverage and employee eligibility in the case of joint employment and sets forth the responsibilities of the primary and secondary employers. The DOL proposes that Professional Employer Organizations (“PEOs”) that contract with client employers only to perform administrative functions – including payroll, benefits, regulatory paperwork, and updating employment policies – are not joint employers with their clients, *provided*: (1) they merely perform such administrative functions and do not have the right to hire, fire, assign, or direct and control the client’s employees, and (2) do not benefit from the work that the employees perform.

Definition of “Eligible” Employee (§ 825.110)

- This section sets forth the eligibility standards employees must meet in order to take FMLA leave, including the requirement that the employee must have been employed by the employer for at least 12 months, and that the 12 months need not be consecutive. The DOL proposes that, although the 12 months of employment need not be consecutive, employment prior to a continuous break in service of five years or more need not be counted.¹

¹ The DOL has not proposed changing the three-year record keeping requirements under the FMLA. Therefore, as in the past, employers must retain documentation to confirm previous employment for a former employee who at the time of rehiring had a break in service of three years or less. Where an employee relies on a period of employment that predates the employer’s records, it will be incumbent upon the employee to demonstrate some proof of the prior employment.

However, the DOL also proposes two new exceptions to the general rule discussed above: (1) a break in service resulting from the employee's fulfillment of military obligations; and (2) a period of approved absence or unpaid leave, such as for education or child rearing purposes, where a written agreement or collective bargaining agreement exists concerning the employer's intent to rehire the employee. In these situations, employment prior to the break in service must be used in determining whether the employee has been employed for at least 12 months, regardless of the length of the break in service.

- The DOL proposes to clarify existing language to the effect that employee eligibility determinations "must be made as of the date leave commences." This language has led to confusion regarding eligibility when employees who fulfilled the 1,250 hours worked requirement, but not the 12 months of employment requirement, begin a block of leave. The proposal clarifies that when an employee is on leave at the time s/he meets the 12-month eligibility requirement, the period of leave prior to meeting the statutory requirement is non-FMLA leave and the period of leave after the statutory requirement is met is FMLA leave.

Serious Health Condition (§§ 825.113, 825.115)

- The DOL essentially retained the current definition of "serious health condition," with some slight modifications. Notably, the DOL did not propose modifying the types of treatments and conditions ordinarily excluded by the definition (colds, flu, etc.). The DOL also announced that it would adhere to its current objective test that, ordinarily, such health conditions would not satisfy the definition of "serious health condition" in § 825.114(a)(2) *unless* they met the regulatory criteria for a serious health condition, *i.e.*, an incapacity of more than three consecutive calendar days that also involves qualifying treatment.
- Section 825.115 defines continuing treatment for purposes of establishing a serious health condition. The current regulation establishes that an employee can meet this definition if, in connection with a period of incapacity of more than three consecutive calendar days, the employee or family member has one visit to a health care provider and a regimen of continuing treatment, such as a prescription, or two visits to a health care provider. The DOL proposes that the two visits to a health care provider must occur within 30 days of the beginning of the period of incapacity unless extenuating circumstances exist, instead of the completely open-ended time frame now existing under the current regulations.

- The regulations currently provide that a chronic serious health condition "[r]equires periodic visits for treatment," yet do not define "periodic." The DOL now proposes to define the term "periodic" as twice or more a year in connection with chronic serious health conditions.

Definition of Spouse, Parent, Son or Daughter, Adoption and Foster Care (§ 825.122)

- The current regulations provide definitions of spouse, parent, and son or daughter for purposes of determining whether an employee qualifies for FMLA leave and provide FMLA leave where a child 18 years or older is incapable of self-care because of a disability. The DOL proposes to specify that the determination of whether an adult child has a disability should be made *at the time leave is to commence*.

Needed To Care For a Family Member (§ 825.124)

- The DOL clarified that the employee seeking protective leave need not be the *only* individual or family member available to care for the qualified family member.

Definition of Health Care Provider (§ 825.125)

- The DOL submits that physician assistants ("PAs") be added to the list of recognized health care providers and proposes deleting the existing requirement that PAs operate "without supervision by a doctor or other health care provider."

Amount of Leave (§ 825.200)

- The DOL asked in the Request whether "scheduled holidays [should] count against an employee's 12 weeks of FMLA leave when the employee is out for a full week as they do now?" Under the proposal, if an employee needs less than a full week of FMLA leave, and a holiday falls within the partial week of leave, the hours that the employee does not work on the holiday cannot be counted against the employee's FMLA leave entitlement if the employee would not otherwise have been required to report for work on that day. However, if an employee needs a full week of leave in a week with a holiday, the hours the employee does not work on the holiday will count against the employee's FMLA entitlement.

Intermittent Leave or Reduced Leave Schedule (§§ 825.202, 825.203)

- The proposed regulations clarify that an employee who takes intermittent leave when medically necessary has a

statutory obligation to make a “reasonable effort” as opposed to an “attempt” to schedule leave so as not to disrupt unduly the employer’s operations.

Substitution of Paid Leave (§ 825.207)

- The proposed regulations clarify that the terms and conditions of an employer’s paid leave policies apply and must be followed by the employee in order to substitute any form of accrued paid leave – including, for example, paid vacation, personal leave, family leave, “paid time off” (PTO), or sick leave – for unpaid FMLA leave.
- The DOL clarifies what is meant in § 825.207 by the term “substitution.” For FMLA purposes, “substitution” means that the unpaid FMLA leave and the paid leave provided by an employer run concurrently. This is standard practice under the current regulations and is not a change in DOL enforcement policy.
- The DOL also has proposed certain safeguards for employees. Thus, when providing notice of eligibility for FMLA leave to an employee, an employer must make the employee aware of any additional requirements for the use of paid leave and must inform the employee that s/he remains entitled to unpaid FMLA leave even if s/he decides not to follow the employer’s paid leave policies (e.g., the employee may still take less than full day intermittent leave even if the employer’s paid leave policies only offer full day leave or PTO).
- The proposed regulations delete language providing that when an employer’s procedural requirements for taking paid leave are less stringent than the requirements of the FMLA, employees cannot be required to comply with higher FMLA standards.
- The new rules would allow the use of compensatory time accrued by public agency employees under the Fair Labor Standards Act (FLSA) to run concurrently with unpaid FMLA leave when leave is taken for an FMLA-qualifying reason.

Employee Failure To Make Health Premium Payments (§ 825.212)

- The DOL proposals add language making clear that if an employer allows an employee’s health insurance to lapse due to the employee’s failure to pay his/her share of the premium as set forth in the regulations, the employer still has a duty to reinstate the employee’s health insurance when the employee returns to work. If the employer fails to reinstate the insurance, it can be liable for harm suffered by the employee if it fails to do so.

Equivalent Position (§ 825.215)

- This section defines equivalent pay, including when an employee is entitled to pay increases and certain types of bonuses when taking FMLA leave. The DOL proposes to allow an employer to disqualify an employee from a bonus or award predicated on the achievement of a goal where the employee fails to achieve that goal as a result of an FMLA absence (so long as the employer disqualified such an employee in a non-discriminatory fashion).

Protection For Employees Who Request Leave or Otherwise Assert FMLA Rights (§ 825.220)

- The DOL clarified that the voluntary settlement and release of past FMLA claims is valid without having to first obtain the permission or approval of the DOL or a court. This proposal carries forward the DOL’s understanding of its existing regulations, and in effect rejects the Fourth Circuit’s decision in *Taylor v. Progress Energy*, 493 F.3d 454 (4th Cir. 2007), *petition for cert. filed*, 75 U.S.L.W. 3226 (Oct. 22, 2007) (No. 07-539), which held that employees cannot voluntarily settle their past FMLA claims. Hence, under the proposed regulation, only the waiver of prospective FMLA rights is prohibited.

Employer Notice Requirements (§ 825.300)

- To streamline its current notice requirements that an employer post FMLA notice to individual employees even if no employees are eligible for FMLA leave and place in an employee handbook (if one exists) a notice of FMLA rights and responsibilities and the employer’s policies on the FMLA, the DOL proposes that one document containing identical information be both posted and distributed, thereby satisfying both the posting and distribution requirement.
- The DOL further proposes that if notice is not contained in an employee handbook, it must be distributed annually, regardless of specific employee requests for leave.
- In *Ragsdale v. Wolverine World Wide, Inc.*, the Supreme Court suggested that if an employer fails to notify an employee of his or her FMLA rights, the employee may have a remedy if the employee can show that the employer interfered with, restrained or denied the employee the exercise of his or her FMLA rights *and* that the employee suffered damages as a result. *See Ragsdale*, 535 U.S. 81, 89 (2002). In response, the DOL now proposes that the employer’s failure to comply timely

with the notice designation requirements could result in interference with, restraint of, or denial of the use of FMLA leave. Thus, if the employee can show individualized harm as a result of the employer's failure to provide notice of eligibility or designation of FMLA leave as required, the employee is entitled to the remedies provided by the statute (*e.g.*, lost compensation and benefits, etc.). Under the proposed regulations, this language would apply to (i) situations where an employer fails to notify an employee of his or her FMLA rights, (ii) how employees are protected when they assert their FMLA rights, and (iii) employees' designation of FMLA leave.

Eligibility Notice

- The new rules would require that the eligibility notice be conveyed within five business days (previously two business days) after the employee either requests leave or the employer acquires knowledge that the employee's leave may be for an FMLA-qualifying reason.
- Another proposal would require the employer to notify an employee who requests leave whether FMLA leave is still available to the employee in the applicable 12-month period. This is not required under the current regulations. If the employee is not eligible or has no FMLA leave available, then the notice must indicate the reasons why the employee is not eligible or that the employee has no FMLA leave available.
- When an employer notifies an eligible employee of the right to substitute employer-provided paid leave and the conditions related to any such substitution, the proposed regulations also would require the employer to inform the employee that s/he may take unpaid FMLA leave if the employee does not comply with the terms and conditions of the employer's paid leave policies.
- The DOL proposes that employers should include a statement of the employee's essential job functions with the eligibility notice if they will require that those functions be addressed in a fitness-for-duty certification.

Designation Notice

- Like the new time frame for submission of eligibility notice, the DOL proposes that an employer notify the employee within five business days (previously two business days) that leave is designated as FMLA leave once the employer has sufficient information to make such a determination.
- The proposed designation notice also contains an additional provision that would expressly require the

employer to inform the employee, if possible, of the number of hours, days or weeks that will be designated as FMLA leave. However, to the extent that future leave will be needed by the employee for a condition, but the exact amount of leave is unknown (as is often the case with unforeseeable intermittent leave for a chronic serious health condition), the employer must inform the employee every 30 days that leave has been designated and protected under the FMLA and advise the employee as to the amount so designated if the employee took leave during the 30-day period. An employer also will be required to notify the employee if the leave is *not* designated as FMLA leave due to insufficient information or a non-qualifying reason. The current regulations do not specifically address designation of unforeseen, intermittent leave.

- This proposal also permits an employer to provide an employee with both the eligibility and designation notice at the same time in cases where the employer has adequate information to designate leave as FMLA leave when an employee requests the leave.

Employer Designation of FMLA Leave (§ 825.301)

- In light of *Ragsdale*, the DOL's proposed revisions acknowledge that employers may retroactively designate FMLA leave absent a showing of individual harm, but that if an employer fails to designate leave, timely and if an employee establishes that he or she has suffered harm as a result of the employer's actions, a remedy may be available.
- The remedies an employer may be liable for include compensation and benefits lost by reason of the violation, other monetary losses sustained as a direct result of the violation, and appropriate equitable relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered.

Employee Notice Requirements For Foreseeable FMLA Leave (§ 825.302)

- This proposed regulation provides that when an employee gives less than 30 days advance notice of the need for FMLA leave, the employee must respond to a request from the employer and explain why it was not practicable to give 30 days notice.
- Currently, an employee must give at least 30 days' notice if his/her request for FMLA leave is foreseeable, and if such notice is not possible, the employee must give notice "as soon as practicable." Under the new regulations, the DOL proposes to delete the definition of "as soon as

practicable,” which is currently defined as “ordinarily . . . within one or two business days of when the need for leave becomes known to the employee.” In its commentary, the DOL explained that, absent emergency situations, where an employee becomes aware of a need for FMLA leave less than 30 days in advance, the DOL 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).

- With respect to the content of employee notice, the DOL proposes to retain the standard that an employee need not assert his/her rights under the FMLA or even mention the FMLA to put the employer on notice of the need for FMLA leave, but at the same time employees must provide sufficient information to make an employer aware that FMLA rights may be at issue. However, the DOL proposes clarifying that “sufficient information” must indicate that the employee is unable to perform the functions of the job (or that a covered family member is unable to participate in regular daily activities), the anticipated duration of the absence, and whether the employee (or family member) intends to visit a health care provider or is receiving continuing treatment.
- The proposed rule also states that employees must respond to employers’ inquiries designed to determine whether leave is FMLA-qualifying. If they do not, employees risk losing FMLA protection if the employer is unable to determine whether the leave qualifies.
- The DOL proposes elimination of language in the current regulations to the effect that an employer cannot delay or deny FMLA leave if an employee fails to follow the employer’s usual notice and procedural requirements for calling in absences and requesting leave. In its stead, under the proposed regulations, absent unusual circumstances, employees may be required to follow established call-in procedures (so long as they comport with the regulations), and failure to properly notify employers of absences may cause a delay or denial of FMLA protections.
- The proposed regulation eliminates language that employers cannot enforce FMLA notice requirements if those requirements are stricter than the terms of a collective bargaining agreement, state law or employer leave policy.

Employee Notice Requirements For Unforeseeable FMLA Leave (§ 825.303)

- The DOL proposes to maintain the requirement that an employee provide notice as soon as practicable under the facts and circumstances of the particular case (*i.e.*, the same standard as notice for foreseeable FMLA leave).
- Consistent with its proposed changes for foreseeable FMLA leave, the DOL would require that the employee provide the employer with sufficient information to put the employer on notice that the absence may be FMLA-protected when the leave is unforeseeable.
- The same definition of “sufficient information” would apply for both foreseeable and unforeseeable leave. However, in the case of unforeseeable leave, the DOL further proposes that calling in with the simple statement that the employee or the employee’s family member is “sick” without providing more information will not be considered sufficient notice to trigger an employer’s obligations under the Act.
- Under the DOL proposals, an employee must comply with the employer’s usual procedures for calling in and requesting unforeseeable leave, except when extraordinary circumstances exist (such as when the employee or a family member needs emergency medical treatment). Except under extraordinary circumstances, if an employee fails to follow the employer’s call-in procedures, then the employee will be subject to whatever discipline the employer’s rules provide for, and the employer may delay FMLA coverage until the employee complies with the rules.

Medical Certification (§§ 825.305, 825.306, 825.307)

- The DOL proposes that the time frame for submitting a medical certification be modified to clearly apply the 15-day standard for both foreseeable and unforeseeable leave.
- Consistent with modifications made to other FMLA notice regulations, the DOL proposes that the requirement that an employer request medical certification from the employee within two business days of receiving the employee notice be extended to five business days.
- Under a proposed new DOL standard addressing the completeness and sufficiency of certification, “a certification is considered incomplete if the employer receives a certification, but one or more of the applicable entries have not been completed.” This DOL proposal also would define an insufficient certification as one

where the information provided is “vague, ambiguous or non-responsive.”

- Turning to the process for curing an incomplete or insufficient certification, the DOL proposes that when an employer determines that a certification is incomplete or insufficient, the employer must state in writing what additional information is necessary and provide the employee with seven calendar days to cure the deficiency. Additional time must be allowed where the employee notifies the employer within the seven-calendar day period that s/he is unable to obtain the additional information despite diligent good faith efforts. If the deficiencies specified by the employer are not corrected in the resubmitted certification, the employer may deny FMLA leave.
- The DOL proposes language specifying that a certification never submitted to the employer does not qualify as an incomplete or insufficient certification but constitutes a failure to provide certification.
- The DOL further clarifies that it is the employee’s responsibility either to provide such a complete and sufficient certification or to furnish the health care provider providing the certification with any necessary authorization from the employee or the employee’s family member – such as that required by Health Insurance Portability and Accountability Act (“HIPAA”) – in order for the health care provider to release a sufficient and complete certification to the employer to support the employee’s FMLA request.
- The DOL proposes adding a provision allowing for annual medical certifications in those circumstances where the serious health condition extends beyond a leave year.

Proposed Certification Requirements

- The DOL proposes the following revisions to the medical certification form: (i) the pertinent specialization and fax number of the health care provider must be provided; (ii) the health care provider may provide information on the diagnosis of the patient’s health condition (however, such a diagnosis is not a necessary component of a complete FMLA certification); and (iii) the health care provider must certify that intermittent or reduced schedule leave is medically necessary.
- Pursuant to the requirement that a complete certification contain appropriate medical facts regarding the patient’s health condition for which FMLA leave is requested, the DOL also proposes guidance as to what constitutes sufficient medical facts for purposes of responding to this

question (i.e., information on symptoms, hospitalization and doctors visits, whether medication has been prescribed, referrals for evaluation or treatment or any other regimen of continuing treatment).

- The DOL posits new language clarifying that employees need not sign a release as part of the medical certification process.

Interaction Between FMLA and Employer Policies

- The DOL proposes that if the employer is permitted “to request additional information” from the workers’ compensation health care provider, the FMLA does not prevent the employer from following the workers’ compensation provisions.
- In an effort to clarify the interaction between paid leave under sick leave or benefit plans and FMLA leave, the DOL proposes that if an employee ordinarily is required to provide additional medical information to receive payments under a paid leave plan or benefit plan, an employer may require that the employee provide the additional information to receive those payments, as long as it is made clear to the employee that the additional information is requested only in connection with qualifying for the paid leave benefit and does not affect the employee’s unpaid FMLA leave entitlement.

Interaction Between FMLA Certification and ADA Medical Inquiries

- Where a serious health condition also may be a disability, the DOL seeks to clarify that employers are not prevented from following the procedures under the ADA for requesting medical information.

Authentication and Clarification of Medical Certification

- A proposed regulation clarifies the limited nature of the authentication process (i.e., that it does not involve disclosure of any additional medical information) and removes the requirement of employee consent to authenticate the certification.
- In lieu of the current requirement that the employee provide permission for the employer to clarify the medical certification, the DOL proposes that contact between the employer and the employee’s health care provider for the purpose of clarifying the medical certification must comply with the HIPAA Privacy Rule. Language also has been proposed to make clear that if such consent is not given, an employee may jeopardize his or her FMLA rights if the information provided is incomplete or insufficient.

- Significantly, the DOL has determined that employers should be allowed to contact the employee's health care provider directly for the purposes of authenticating and clarifying the medical certification. Accordingly, the new proposal eliminates the requirement that the employer's health care provider, as opposed to the employer itself, contact an employee's health care provider.
- To facilitate the second opinion process, the DOL proposes requiring the employee (or family member) to authorize the release of relevant medical information regarding the condition for which leave is sought from the employee's (or family member's) health care provider to the second or third opinion provider.

Recertifications (§ 825.308)

- The DOL proposes to permit employers to obtain recertifications every six months in circumstances in which the certification indicates that the condition will last for an extended period of time. An extended period of time includes not only specific months or years (*e.g.*, one year) but certified durations of "indefinite," "unknown," or "lifetime."
- The DOL also proposes that recertification may be requested in less than 30 days if the employee requests an extension of leave, the circumstances have changed significantly based on the duration or frequency of the absence or the nature or severity of the illness, or if the employer receives information that casts doubt upon the employee's stated reason for the absence or the continuing validity of the certification.
- Under the proposed regulation, as part of the information allowed to be obtained on recertification, the employer may provide the health care provider with a record of the employee's absence pattern and ask the health care provider if the serious health condition and need for leave is consistent with such a pattern.

Fitness-For-Duty Certification (§ 825.310)

- For purposes of authenticating and clarifying the fitness-for-duty statement, the proposed regulation provides that the employer may contact the employee's health care provider consistent with the procedures set forth in § 825.307.
- The proposal also replaces the requirement that the certification must only be a "simple statement" with the statutory language that the employee must obtain a certification from his or her health care provider that the employee is able to resume work.

- The DOL proposes that an employer be permitted to require an employee to furnish a fitness-for-duty certificate every 30 days if an employee has used intermittent leave during that period and reasonable safety concerns exist.

Interaction With Employer's Policies (§ 825.700)

- In *Ragsdale*, the U.S. Supreme Court invalidated the last sentence of current § 825.700(a), which states that if an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement. The DOL proposes to delete this sentence.

Expansion of Family Leave to Family Members of Wounded Servicemembers

On January 28, 2008, President Bush signed into law the National Defense Authorization Act for 2008 ("NDAA"). HR 4986 amended the FMLA to include new sections regarding special FMLA coverage for families of servicemembers called up to duty in Iraq and Afghanistan and injured in those theatres of operation. The DOL was required to issue regulations to implement some of the provisions of the new statute. The NDAA contains provisions amending the FMLA to provide two new types of leave. The first is servicemember family caregiver leave that provides up to 26 weeks of protected unpaid leave in a single 12-month period to any eligible employee who is the spouse, child, parent, or next-of-kin (*i.e.* closest blood relative) of a covered servicemember to care for his/her relative (the servicemember) injured during active duty. This provision was effective as of January 28, 2008. The second new provision permits an otherwise eligible employee to take up to 12 weeks of leave (in a 12-month period) as a result of any "qualifying exigency" because the employee's spouse, son, daughter or parent is on active duty (or has been notified of an impending call to duty) in the Armed Forces in support of a "contingency operation." Notice of the need for such leave to one's employer must be reasonable and practicable. This latter provision will become effective only upon issuance of the DOL's regulations, although the DOL has encouraged employers to act reasonably in affording such leave in the interim.

The amendments' caregiver provisions are significant not only because they more than double the available leave time to those employees who care for injured servicemembers, but also because the new law broadly defines "covered servicemember" to include "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 otherwise on the temporary disability retired list, for a serious injury or

illness.” The amendments also expand the definition of “covered employee” to include one’s next-of-kin, meaning nearest blood relative of that individual.

While the DOL issued an advance notice of proposed rulemaking, it has indicated that where possible, it will forgo formal proposed rulemaking and issue final regulations. Further, it urged employers to follow the advance rulemaking where possible. The DOL has issued a new Notice addressing the NDAA amendments to the FMLA, available at <http://www.dol.gov/esa/whd/fmla/NDAAAmndmnts.pdf>, that employers should post and incorporate into their written policies. We suggest that you review this section of the Client Alert carefully with respect to questions raised by the DOL as well as those areas where it suggests implementing regulations.

Unfortunately, however, given the recent enactment of the NDAA, the DOL has not had adequate opportunity to address the impact on the FMLA of the family servicemember leave provisions. In its proposed Regulations, the DOL seeks comments on a host of issues raised by the new law, rather than affirmatively setting forth proposed new rules. For example, while the DOL states its initial view that “undergoing medical treatment” means “any treatment, recuperation, or therapy provided to a servicemember for a serious injury or illness,” it is soliciting comments on whether there should be a requirement of temporal proximity between the covered servicemember’s injury or illness and the treatment, recuperation, or therapy. Alternatively, the DOL inquires whether it should rely on the Defense Department’s determination as to whether a servicemember is undergoing medical treatment, recuperation, or therapy for a serious illness or injury.

Similarly, while the FMLA amendments define “next-of-kin” as the “nearest blood relative” of an individual, the DOL offers up a list of 8 categories fitting the definition including, for example, natural and adopted children, remarried surviving spouses, grandparents, and others, and inquires whether it should adopt this list or whether it should require a certification of next-of-kin status. Continuing further, the DOL inquires whether “nearest blood relative” means that each covered servicemember may have only one next-of-kin who is eligible to take FMLA leave to provide care if the servicemember is undergoing treatment, recuperation or therapy. Alternatively, the DOL asks whether this language should be interpreted to provide military caregiver leave to any eligible next-of-kin, or if it is better to have the servicemember designate any blood relative or other individual such as those recognized by the Defense Department’s Committed and Designated Representative.

Questions abound under the new servicemember family leave provisions. Thus, the DOL inquires whether the new enactment permits eligible employees to take military caregiver leave to care for a servicemember whose serious injury or illness was incurred in the line of duty but does not manifest itself until *after* the servicemember has left the military service. Also, should the terms “son or daughter” be given a broader meaning under military family leave to include adult children? Equally important, is the caregiver family servicemember leave only available during one single 12-month period or may an employee have multiple entitlements? Also, how and from when is the 12-month period calculated: from the date of the servicemember’s injury, the date of the determination that the servicemember has a serious injury or illness, or the date when the employee is needed to care for the seriously injured/ill servicemember? No less difficult, the DOL asks can the 26-workweek leave entitlement be interpreted to apply per covered servicemember so that an eligible employee is entitled to 26 weeks of leave to care for his/her injured daughter as well as his/her injured parent who is also a covered servicemember.

Perhaps raising the most significant issues under the new military family leave enactment, the DOL seeks comments on the new qualifying reason to take family leave: “because of any qualifying exigency...arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation.” It is the DOL’s initial view that there must be some nexus between the eligible employee’s need for leave and the servicemember’s active duty status, although the DOL seeks comments on the degree of nexus required to demonstrate that the exigency arises out of the servicemember’s active duty status. The DOL also posits that leave for qualifying exigencies should be limited to non-medical-related exigencies and is soliciting comments on whether it would be appropriate to develop a list of pre-deployment, deployment, and post-deployment qualifying exigencies. Indeed, the DOL believes that a “qualifying exigency” could be something fairly mundane and routine and sets out its preliminary view that it would include leave for making child care arrangements, making financial/legal arrangements to address the servicemember’s absence, and attending counseling sessions related to the active duty of the servicemember, among other things.

In addition, the usual rules governing substitution of paid leave, intermittent leave, and reduced schedule leave apply to the new types of FMLA military leave. The DOL is soliciting comments as to whether any modifications in existing regulations with respect to the aforementioned areas are required for the new military leave entitlements.

Conclusion: What Should Employers Do Now

For the moment, the most important thing employers must do is to notify employees promptly of the new military leave provisions in writing, post the DOL's approved Notice adjacent to the FMLA Notice, and amend their FMLA policies and leave request forms as appropriate to reflect the new military family leave amendments. In so doing, keep in mind that the servicemember family leave provides up to 26 weeks of such caregiver leave in a single 12-month period and is now effective. Although the "qualifying exigency" leave entitlement is not yet effective, pending final regulations, the DOL has encouraged employers to act reasonably, in the interim, in affording such leave.

As to the primary focus of this Client Alert, – the newly proposed FMLA regulations – these are *not* yet final or effective. However, as you can see, the new proposals will significantly impact the manner in which the FMLA has been applied and interpreted and will require that employers make adjustments in their practices. For the most part, the proposals suggest newfound pragmatism and alert both employees and employers as to what is expected of each. Accordingly, employers should familiarize themselves with the proposed rules, but await final implementation, before changing policies, which could be months away (except for those military service leave provisions that are now effective).

In the meantime, if you have any questions about changing your FMLA policies in accordance with the new servicemember family leave requirements, or in connection with any aspect of the proposed new regulations, please contact your Proskauer relationship attorney or any of the attorneys listed who assisted with this Client Alert. Finally, as Proskauer will be preparing comments on behalf of the firm and its clients regarding the proposed FMLA regulatory changes, please be sure to share your views in the next 60 days with us as we welcome your participation and suggestions in this effort.

You can also visit our Website at www.proskauer.com

BOCA RATON • BOSTON • LONDON
LOS ANGELES • NEW ORLEANS • NEW YORK • NEWARK
PARIS • SÃO PAULO • WASHINGTON, D.C.

Client Alert

Proskauer's nearly 175 Labor and Employment lawyers are capable of addressing the most complex and challenging labor and employment law issues faced by employers.

For more information about this practice area, contact:

New York

Paul Salvatore

212.969.3022 – psalvatore@proskauer.com

Elise M. Bloom

212.969.3410 – ebloom@proskauer.com

Fredric C. Leffler

212.969.3570 – fleffler@proskauer.com

Marc A. Mandelman

212.969.3113 – mmandelman@proskauer.com

Newark

Lawrence R. Sandak

973.274.3256 – lsandak@proskauer.com

Los Angeles

Anthony J. Oncidi

310.284.5690 – aoncidi@proskauer.com

Arthur F. Silbergeld

310.284.5624 – asilbergeld@proskauer.com

Washington, D.C.

Lawrence Z. Lorber

202.416.6891 – llorber@proskauer.com

New Orleans

Howard Shapiro

504.310.4085 – howshapiro@proskauer.com

Boca Raton

Allan H. Weitzman

561.995.4760 – aweitzman@proskauer.com

Boston

Mark W. Batten

617.526.9850 – mbatten@proskauer.com

Special thanks to associates **Kevin K. Manara** and **Meredith C. Bailey** for assisting with the drafting of this Client Alert.

Proskauer Rose is an international law firm that handles a full spectrum of legal issues worldwide.

This publication is a service to our clients and friends. It is designed only to give general information on the developments actually covered. It is not intended to be a comprehensive summary of recent developments in the law, treat exhaustively the subjects covered, provide legal advice or render a legal opinion.

© 2008 PROSKAUER ROSE LLP. All rights reserved. Attorney Advertising.