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New family leave rules draw mixed reaction

By Nora Lockwood Tooher
Staff writer

While revised Family and Medical Leave Act regulations appear to be a boon for military families, they have come under fire from labor groups due to stiffer rules for other workers.

And on the management side, the changes didn't go as far as many employers would have liked.

The Labor Department issued a final rule on Nov. 17 updating the regulations, marking the first major changes to the Act since its enactment in 1993. The new regulations take effect Jan. 16, 2009.

AFL-CIO President John Sweeney called the final rule an 11th-hour move by the Bush administration to "weaken" the FMLA.

"It's reprehensible … that the Bush administration would use its final days in office to give business interests one more gift by placing more hurdles in front of workers who need to care for their families," he said in a statement.

Sharyn Tejani , senior policy counsel for the National Partnership for Women & Families, a Washington, D.C. advocacy group, said the "overall effect of the regulations is going to be that employees are going to have a harder time taking FMLA leave."

But Paul M. Secunda, an associate professor at Marquette University Law School and a contributor to the Workplace Prof Blog (http://lawprofessors.typepad.com/laborprof_blog/), said that most of the changes are technical ones aimed at making the law less complicated.

"I don't think it's clearly good or bad for either employers or employees," he said.

Highlights of changes

The provisions for military families reflect new rights under FMLA created by the defense authorization law that took effect in February 2008.

The final rule allows up to six months of leave for families of injured service members. Families of active-duty National Guard and Reserve personnel are allowed up to 12 weeks of FMLA leave for "qualifying exigencies," including short-notice deployment; childcare; financial and legal arrangements; counseling and rest and recuperation.

Other significant changes in the regulations include:

- Requiring employees to follow their employers' call-in procedures for reporting absences when notifying employers of their need for FMLA leave. Previously, workers were allowed two days after requesting time off to notify employers that they were using the time as FMLA leave.
- Allowing employers more time – five days, compared with two under the old regulations – to decide whether to grant leave requests.
- Incorporating the U.S. Supreme Court decision in *Ragsdale v. Wolverine World Wide Inc.,* 535 U.S. 81, by removing categorical penalties for employers who fail to appropriately designate FMLA leave.
- Banning employers from counting "light duty" assignments as FMLA leave.


William E. Hannum III

- Requiring employees who take intermittent leave to complete "fitness for duty" evaluations before returning to work.

Management/labor scorecard

The new rule "gives employers clarification on some issues, but does not address many of the concerns employers have experienced in determining what a 'serious health condition' is and how to deal with intermittent leave," said Debra Friedman, an employment lawyer at Cozen O'Connor in Philadelphia.

Will Hannum, a partner at Schwartz Hannum in Andover, Mass., said many employers had hoped that the rules would require employees to take leave in longer increments.

"Employers wanted a way to control intermittent level [leave] so that they are less at the mercy of whatever [the employee's] circumstances are," he said.

However, he predicted that employers will be "thrilled" that the new rule makes it clear that employees can settle or release FMLA claims without court or DOL approval.

As for labor groups, they are less than thrilled with a requirement that an employee who uses accrued paid time off concurrently with FMLA leave has to follow their employers' policies for paid vacation and sick leave.

Some companies require employees to bid for vacation time, Tejani noted, or refuse to allow employees to use certain weeks for vacation time. That means that employees who used to be able to use paid vacation time during FMLA leave will now have to follow their employer's rules.

"So, for anybody who can't afford to take unpaid leave, you're effectively making FMLA unusable," she remarked.

Tejani also objected to a provision in the rule that will allow an employer's representative to contact an employee's health care provider. (The company representative has to be someone besides the employee's direct supervisor.)

"They're saying it has to be someone in HR or management, but it's still your employer," she said.

Both sides predicted pressure for further changes to the Act once President-elect Barack Obama takes office.

Obama had proposed broadening coverage from only companies with 50 or more employees to those with 25 or more employees. He also proposed extending FMLA coverage to elder care, caring for victims of domestic violence and children's educational activities.

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