THE RESOURCE

A Legal Newsletter for Employers & Human Resource Professionals
By: L. Diane Tindall, Mary M. Williams and J. Kellam Warren
Attorneys-at-Law

Our Business Is Law. WYRICK | ROBBINS | YATES & PONTON | LLP

Issue XXXV – Winter 2007/2008

Inside this issue:

WYRICK ROBBINS YATES & PONTON LLP

RE-FOCUS ON FMLA

Since its enactment in 1993, the Family and Medical Leave Act ("FMLA" or the "Act") has confounded employers and employees alike. The purpose of the Act was to allow employees to balance their work and family lives by allowing them to take unpaid leave for certain medical and family reasons. Over the past nearly fifteen years, provisions of the Act have been developed and interpreted through Department of Labor Regulations and court cases. This volume of The Resource will address some recent developments and open issues involving the FMLA.

FMLA EXPANDED TO PROVIDE LEAVE FOR MILITARY FAMILIES

On January 28, 2008, President Bush signed into law the National Defense Authorization Act of 2008 (the "NDAA"). Among other things, the NDAA amends the Family and Medical Leave Act ("FMLA") to permit a "spouse, son, daughter or next of kin" to take up to 26 work weeks of protected job leave to care for a "member of the Armed Forces" 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 NDAA also permits an employee to take FMLA leave for any "qualifying exigency" arising out of the fact that the spouse, 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.

The medical care leave provision became effective immediately. The U.S. Department of Labor ("DOL") is requiring employers to act in good faith to provide such leave, although the DOL has not yet issued any

final guidance on the Act. The "qualifying exigency" provision is not effective until the Secretary of Labor issues final Regulations defining "any qualifying exigency." Although proposed new Regulations published on February 11, 2008 shed some light on how DOL will ultimately define such terms as "next of kin" and "qualifying exigency," the final Regulations will not be forthcoming for some months. In the interim, the DOL is encouraging employers to also provide this type of leave to qualified employees.

In order to comply with the NDAA pending the issuance of final Regulations by the DOL, covered employers (those with 50 or more employees) should consider providing employees with a notice advising them of their rights under the NDAA. Qualified employees must be afforded their medical leave rights under NDAA, effective immediately. Covered employers should also consider providing leave under circumstances that might constitute "a qualifying exigency." Although final Regulations defining "qualifying exigency" have not yet been issued by the DOL, it would conceivably include such things as preparation for the deployment of a family member, providing child or parental care (where there is no serious health condition) or taking care of a service member's personal and financial matters while he or she is on active duty. Because the NDAA amends the FMLA, employers should provide the NDAA leave using their existing FMLA procedures (such as, for example, providing forms and notices and requiring the substitution of paid leave). Once the DOL has provided its final Regulations, covered employers should revise their FMLA policies to include a description of qualified employees' new rights under the Act.

PROPOSED REGULATIONS TO FMLA OFFER GUIDANCE

Chances are, if you are an employer of 50 or more employees, you are familiar with the Family Medical Leave Act ("FMLA" or "Act"), which requires covered employers to provide up to 12 weeks of unpaid, job-protected leave for the birth or adoption of a child; to care for a sick child, parent or spouse; or when an employee has a "serious health condition." Employees must have worked for 12 months and 1,250 hours during the previous year to be eligible for FMLA leave.

The FMLA was enacted to balance the demands of the workplace with the needs of families, but since its enactment, courts across the country have issued conflicting interpretations of this statute, and employers and employees alike have struggled with this complex piece of legislation.

On February 11, 2008, the Department of Labor ("DOL") published proposed revisions to the FMLA Regulations in an effort to clear up ambiguities that have plagued employers and employees in administering this statute. Unfortunately, the DOL's proposals still leave some unanswered questions.

The most significant proposed changes include the following:

- Employers will be able to contact employees' doctors directly for purposes of clarification and authentication of FMLA medical certification forms completed by the doctors. Currently, to obtain this information, employers either have to retain their own doctor or obtain permission from the employee to contact his or her medical provider.

- Employees eligible for a bonus based on the achievement of a specified goal such as perfect attendance, who have failed to meet such a goal as a result of FMLA leave, may be denied the bonus, provided that similarly situated employees were also denied the bonus.

- Employers will have more guidance on how to treat a holiday which falls within an employee's FMLA leave. If the employee needs leave for the entire week in which the holiday falls, the holiday counts against the leave. If the employee works a portion of the week in which a holiday falls, the holiday does not count against the leave if the employee was not otherwise required to work on that holiday.

- Absent extraordinary circumstances, employees will be required to follow employer procedures for notification of FMLA leave. This change could provide employers with more advance notice to plan for an employee's leave.

- Employees and employers are permitted to voluntarily settle past FMLA claims without court or DOL approval. Future FMLA rights may not be waived.

While these proposed changes provide some added clarity regarding employers' duties under the Act, the proposed changes provide only minimal guidance regarding one of the most perplexing problems facing employers under the FMLA: the administration of "intermittent leave." The FMLA currently allows employees to take FMLA leave in separate, intermittent blocks of time due to a single reason, such as pregnancy, when, for example, leave is used intermittently for prenatal care examinations or episodes of severe morning sickness. The FMLA currently provides that employers must provide intermittent leave in the smallest increment of time the employee uses to record time, which could be a minute or less. Many hoped the DOL would set a minimum amount of time—perhaps just a few hours—whenever an employee requested intermittent leave under the FMLA. As mentioned above, however, while the proposed changes will require employees to use their employer's regular call in procedure to notify their employer of the need for FMLA leave, the Regulations do not set minimum increments in which employees can take intermittent leave. Thus, employees will still be able to take intermittent leave in very short increments, which means employers will continue to face administrative burdens when employees take intermittent leave.

In addition, employers and employees have faced uncertainty in determining what qualifies as a "serious health condition." While the proposed Regulations do address this issue, they will not alleviate much of the current confusion. For example, the DOL specifically declined to identify a list of minor illnesses that would never constitute a FMLA-serious health condition. Instead, the two changes that have been proposed clarify the amount of time in which an employee's doctor's visits must occur in order for an employee's health condition to be considered "serious." Specifically, one form of a serious health condition involves incapacity of more than three days and either (a) two doctor's visits or (b) one doctor visit with a regimen of continuing treatment. The two doctor visit requirement is currently open-ended; the proposed change provides that the two doctor's visits must occur "within a 30-day period." Another form of serious health condition involves "chronic conditions" which require at least two periodic doctor visits to a health care provider for treatment. Under the current Regulations, "periodic" is not defined, but the proposed changes provide that these two "periodic" visits must occur within a one year period.

The full text of the proposed Regulations can be found at http://www.dol.gov/esa/whd/fmla/FedRegNPRM.pdf, and will be open for public comment until April 11, 2008. If you have any questions about any of the proposed Regulations, please call our employment law team.

NOTICE, WHAT NOTICE? WHAT IS SUFFICIENT NOTICE THAT AN EMPLOYEE NEEDS FMLA LEAVE

As we all know by now, the Family and Medical Leave Act ("FMLA") requires employers with 50 or more employees to provide up to twelve weeks of unpaid leave to qualified employees who cannot work due to a serious health condition. As we also know, if the need for leave is foreseeable, the employee is expected to provide 30 days' notice of the need for leave; if the leave is needed to begin sooner, the employee should provide the employer with as much notice as possible and practicable under the facts and circumstances of each individual case. The employee need not expressly assert his or her rights under the FMLA or even mention the FMLA when requesting leave. It is the employer's responsibility to inquire further of the employee if more information is needed to determine whether FMLA leave is being sought by the employee and the details concerning such leave, such as the expected timing and duration of the leave.

Sounds simple, right? Guess again. Below are some surprising cases in which the courts have discussed what is sufficient notice by an employee of the need for FMLA leave.

This is Just a Test. James Sarnowski worked as a service manager for a limo service, and his early performance reviews were very good. After his first year of employment, Sarnowski took off six weeks for quintuple by-pass heart surgery. About a year later, Sarnowski began to experience heart palpitations, so his doctors had him wear a heart monitor to see if additional surgery would be needed. Sarnowski reported this immediately to his boss, indicating that he might need an additional six weeks of leave for another heart surgery. The Company fired him a week later, citing performance problems. Sarnowski later discovered that he would, indeed, need further surgery for blocked arteries.

In the lawsuit that followed, the critical issue was whether Sarnowski provided legally sufficient notice to entitle him to benefits under the FMLA. The court first noted that an employee need not give formal notice of the need for leave or specifically mention the FMLA, and that verbal notice was sufficient. The court also found that an employee who needs medical treatment may inform his employer of the need for leave before scheduling the treatment. The Company tried to argue that Sarnowski wasn't covered by the FMLA, since he was only undergoing tests, and had not yet been diagnosed with a serious health condition. The court rejected this argument, finding that once Sarnowski notified the employer that he was being tested for a condition that could be covered under the FMLA, he was entitled to FMLA protection.

I Feel Sick. David Burnett worked as a janitor for a property management company. In late 2003 and early 2004, Burnett began to suffer from health problems. He reported a "weak bladder," began to visit a doctor with some frequency and underwent a series of tests, including a prostate biopsy. When, shortly after his biopsy, Burnett submitted two requests for vacation time, his supervisor met with him to discuss his requests. Burnett informed his supervisor that he "felt sick," and would not put his job above his health. He then clocked out and went home. In response, the Company terminated Burnett's employment. Although Burnett later was diagnosed with prostate cancer and submitted medical documentation to his employer, the employer refused to reconsider its decision.

In the federal lawsuit that Burnett filed against his former employer, the court found that there were a number of key incidents and communications that sufficiently provided the

Company with notice of Burnett's need for FMLA leave: Burnett's report of a "weak bladder"; the Company's knowledge that Burnett was having frequent doctor's visits and undergoing medical tests; the Company's notice that Burnett had undergone a prostate biopsy; and Burnett's reports that he "felt sick" and that his symptoms were like those of a relative who had prostate cancer. The court concluded, that, based on these facts and circumstances, the employer was under a duty to investigate whether Burnett needed FMLA leave before it terminated his employment.

I Feel Very Sick. John Byrne worked as the only engineer on the night shift for Avon Products. By all accounts, Byrne was an excellent employee. However, after more than four years of model service, his supervisor began to notice Byrne taking long naps in the Company's break room during his shift. Before the Company could investigate further, Byrne reported that he was sick, left work before the end of his shift and did not return. The employer attempted to contact Byrne, and was eventually told by his sister that Byrne was "very sick." A few days later, Byrne's supervisor called him to set up a meeting. In their conversation, Byrne mumbled odd phrases and then failed to attend the meeting. The Company terminated Byrne's employment, and, when Byrne attempted to return to work after 12 weeks, explaining he was receiving treatment for depression, which caused him to have hallucinations and suicidal thoughts, the employer refused to reconsider the termination.

Although the trial court ruled in Avon's favor, on appeal, the court of appeals found that Byrne's behavior—falling asleep on the job and mumbling oddly on the phone to his supervisor, was uncharacteristic of a previously outstanding employee, and that, together with his sister's comment that he was "very sick"—provided the employer with sufficient notice that Byrne was in need of FMLA leave.

I Feel Dog-Gone Sick. Beverly Stevenson worked as a receptionist for an electric company. One morning, a stray dog climbed through a warehouse window and approached Stevenson in the office area where she worked. Immediately after this incident, her supervisor found Stevenson spraying room deodorizer around the room and cursing and screaming that "[expletive deleted] animals should not be in the workplace." The supervisor reported that Stevenson's agitated behavior lasted about three or four minutes, during which she was intimidating and belligerent. Two hours later, Stevenson informed the accounting manager that she was ill and needed to go home. The next day, Stevenson left a voicemail message for her supervisor, saying she wasn't feeling well and would not be in that day.

The next day, two days following the dog incident, Stevenson charged into the office of the Company's president and, in what was described as an explosive encounter, told him that it was wrong for her to be subjected to this kind of thing and "to have [expletive deleted] dogs running by her desk and threatening her," and that management needed to do something about it. The president attempted to calm Stevenson down and to assure her that every effort would be made to prevent any future similar occurrence. After this encounter, which lasted about eight to ten minutes, Stevenson told her supervisor that she could not work, and left the premises. Stevenson then went to the emergency room, where she underwent some tests and was diagnosed with anxiety and stress.

Stevenson called in sick the next three work days. On the following day, when Stevenson reported to work, she found that she had been moved to another office to accommodate her fear of stray animals. Stevenson stayed at work a few hours, then left, but not before she had called the police to report that she was being harassed. She also left the hospital's report of

her earlier emergency room visit on her supervisor's desk. Stevenson continued to call in sick and was ultimately terminated.

The court refused to dismiss Stevenson's lawsuit in which she claimed her employer violated her FMLA rights. A key issue in the case was whether Stevenson had provided her employer with adequate notice of her need for FMLA leave. The court found that Stevenson's behavior was "so bizarre" that it amounted to a "constructive notice" of the need for leave.

What is an Employer to Do? As an employer, you are not required to have "ESP" or to know about every health problem confronting your employees. However, if you do become aware of comments by the employee or others about a health problem, or if you see unusual employee behavior that could be an indication of a serious health condition, the courts will find that this triggers an obligation on your part to engage in further investigation and to provide FMLA benefits if the facts so warrant.

For more information on the topics addressed in this newsletter, contact Diane Tindall at dtindall@wyrick.com, Mary Williams at mwilliams@wyrick.com or Kellam Warren at kwarren@wyrick.com.

CURRENT AND PAST ISSUES OF THE RESOURCE ARE AVAILABLE IN PDF FORMAT THROUGH OUR FIRM'S WEBSITE, www.wyrick.com, AT THE "NEWS AND ARTICLES" LINK.

Wyrick Robbins Yates & Ponton LLP
4101 Lake Boone Trail, Suite 300
Raleigh, NC 27607-7506
(919) 781-4000
www.wyrick.com