



**Overview: Final Regulations to the Family and Medical Leave Act**  
On November 17, 2008, the Bush Administration released its final changes to the FMLA regulations. **The changes will go into effect January 16, 2009.** There are a few pieces of good news in the regulations, but the overall effect of these regulations will be to make it harder for workers to take the leave they need.

## **CHANGES THAT WILL MAKE IT MORE DIFFICULT FOR WORKERS TO TAKE FMLA LEAVE**

### **Direct Contact with Worker's Health Care Provider**

#### *Current Regulation*

- Employers who have questions regarding a worker's (or a family member's) health care certification have to follow a two-step process. First, they must get the worker's consent. Then, the employer must use a health care provider to make contact with the employee's health care provider.

#### *New Bush Administration Regulatory Change*

- Employers still have to get the worker's (or family member's) consent. Then the employer can directly contact the health care provider. The employer representative making the direct contact may not be the employee's direct supervisor.

### **Substitution of Paid Leave**

#### *Current Regulation*

- Workers may freely use their vacation or personal time when on FMLA leave so that the leave is paid.



### *New Bush Administration Regulatory Change*

- Workers have to follow the employer's rules regarding when vacation leave can be used in order to use it while on FMLA leave. So if an employer requires a certain amount of notice, or that vacation leave be used in 4 hour blocks, a worker must abide by those rules in order to use vacation leave while on FMLA leave. This rule will make it harder for workers to be paid while on FMLA leave, especially in situations of unforeseeable or intermittent leave.

### **More Frequent Medical Visits**

#### *New Bush Administration Regulatory Change (no current rule on this)*

- Employers can require workers to recertify their medical condition every six months, even if the original certification made clear that the condition will last longer than six months (e.g. in the case of a chronic condition).

### **Notice Provisions: Shorter for Workers, Longer for Employers**

#### *Current Regulation*

- Foreseeable leave
  - Workers have to give 30 days' notice when possible
  - If 30 days is not possible, workers have up to two days after they find out they need leave to give notice.
- Unforeseeable leave
  - Workers have up to two days after they needed and used leave to give the employer notice that it was FMLA leave.

#### *New Bush Administration Regulatory Change*

- Foreseeable leave



- Workers will have to give 30 days' notice if possible and, if they fail to, the employer can require the worker to explain why this requirement was not met. If the 30 days is not possible, workers will now have just one day after they find out they need leave to give notice. This time frame may be extended depending on the facts and circumstances of the case.
- Unforeseeable leave
  - Workers will have to meet their employer's rules about when to call in and give notice (for example, call in the night before). This time frame may be extended depending on the facts and circumstances of the case.
- Meanwhile, for all types of leave, the regulations *increase* the period of time in which employers have to respond to workers' requests for FMLA leave from two days to five days.
- For both types of leave, workers have to follow their employer's regular notification procedures (written notification, contact a specific person) absent unusual circumstances. If workers fail to meet these rules, FMLA leave can be delayed or denied.

### **Special New Rules for Intermittent Leave and Certain Jobs**

#### *Physical Impossibility (no current rule on this)*

- If the worker uses intermittent leave and therefore cannot rejoin her shift (e.g. if the bus or train has left), the worker has to use FMLA leave for the entire time of the shift. Under this rule, workers will exhaust their FMLA leave very quickly, even if they only need a small amount of time for the leave.

#### *Fitness for Duty (no current rule on this)*

- Workers using intermittent leave will have to provide a medical certificate that shows they are fit to return to duty if the position



and the condition raise “reasonable safety concerns” and if the employer usually requires fitness for duty certifications.

## Waiver

### *Current Regulation*

- Courts are divided as to whether a worker can waive her right to sue her employer for FMLA violations in a settlement or severance agreement without the waiver being reviewed by DOL or the court.

### *New Bush Administration Regulatory Change*

- Waivers of FMLA claims will not have to be reviewed by DOL or a court.

## **POSITIVE REGULATORY CHANGES FOR WORKERS THAT THE BUSH ADMINISTRATION DECIDED NOT TO INCLUDE IN THE FINAL REGULATIONS**

One of the positive changes in the proposed regulations was that workers, once they started the FMLA request process, would receive more information from their employer including (1) the reasons their FMLA leave was denied, (2) how much FMLA leave they had left, and (3) if their health care provider had not returned the medical certification. In addition, employers who do not provide handbooks – currently 8% of employers – would have to inform their employees about the FMLA annually.

In the final regulations, the Bush Administration modified these proposed changes so that employers now have even *fewer* responsibilities in these areas and provide *less information* to employees.



## **PROPOSED REGULATORY CHANGES THAT WERE MODIFIED IN THE FINAL REGULATIONS TO RESPOND TO WORKER CONCERNS**

Because of the concerns raised by workers and their advocates, the Bush Administration modified the proposed regulations so that the final regulations:

- Limit which representatives of the employer can have direct contact with the worker's health care provider.
- Will not require workers to have sworn statements to prove family relations.
- Will allow work done over seven years (rather than five) to count towards the 12 months of employment required for the employee to show eligibility.
- Will not allow employers to force workers who use unscheduled intermittent leave to transfer to another position.