by Kara M. Maciel and Mimi E. Soule

Changes to the FMLA will pose long term ramifications for hotels

For the first time since its enactment in 1993, the Family and Medical Leave Act (FMLA) has received long awaited attention from the Department of Labor (DOL) and Congress in which proposed regulations have been introduced to clarify key provisions and amendments have been enacted to expand the scope of leave permitted under the Act.

As hoteliers are well aware, the FMLA requires employers with 50 or more employees to provide job protected, unpaid leave for up to 12 weeks during any 12-month period to care for seriously ill family members, the birth or adoption of a child, or an employee's own serious health condition.

On January 23, 2008, President Bush signed into law an amendment expanding the FMLA to provide eligible employees, including next of kin, with protected leave to care for a family member injured in the Armed Forces or for any "qualifying exigency" when a family member in the Armed Forces is on active duty or is called into active duty. Specifically, eligible employees are entitled to 12 weeks of leave due to a family member being on active duty or being notified of an impending call to active duty. The FMLA leave may begin as soon as the individual receives a call-up notice. Additionally, employees may take up to 26 weeks of leave during a single 12-month period to care for a recovering service member injured in the Armed Forces.

Notably, certain of the amendments will not go into effect until the DOL issues regulations describing the circumstances under which such military leave may be taken. Some of the provisions on which the DOL has issued proposed regulations include:

- **The Definition of a Covered Service Member.** The DOL proposes that a covered service member be defined as: "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 DOL proposes that the meaning of "undergoing medical treatment, recuperation, or therapy" should cover *any* therapy provided to a service member for a serious illness or injury and not just the therapy provided by the Armed Forces.

- **The Definition of a Qualifying Exigency.** With respect to leave due to a "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), the DOL is seeking comment on: (i) the degree of nexus or connection between the employee's need for leave and the service member's active duty status; (ii) whether leave for qualifying exigencies be limited to non-medical related matters; and (iii) whether the DOL should develop a list of qualifying exigencies and, if so, the types of exigencies that should be included. Until the DOL issues regulations on this definition and when leave may be taken, the leave requirements will not take effect.

- **Calculating the 12-Month Period.** The military family leave amendments allow an eligible employee to take up to 26 weeks of leave in a 12-month period to care for an injured family member; however, the amendments do not provide when the 12-month period begins. The DOL is seeking comment on whether the 12-month period should begin to run on: (i) the date of the service member's injury; (ii) the date that is it determined that the service member has suffered an injury or illness; (iii) the date that an employee is needed to care for a service member; or (iv) any other method of calculation. Additionally, the DOL is seeking comment on whether an eligible employee is entitled to one 26-week leave entitlement or whether an employee should be able to take multiple 26-week leave entitlements, should the employee, for example, have more than one family member in the Armed Services who becomes injured.

Not only was the FMLA expanded, but on February 11, 2008, the DOL published proposed regulations providing important clarifications of key provisions to the FMLA. The following are notable proposed changes to the FMLA:

- **Employee Notice Requirements:** While employees still do not need to mention "FMLA" or provide requests in writing when requesting leave, the proposed changes would require employees to at least state: (i) their incapacity to perform the job, (ii) anticipated duration of the absence, and (iii) whether the employee intends to visit a health care provider or is receiving continuing treatment. Moreover, employees would be obligated to strictly follow an employer's procedures for requesting leave.

- **Employer Notice Requirements:** The proposed changes would give employers 5 days (rather than the current 2) to provide FMLA eligibility and designation notices to employees.

- **Intermittent Leave:** This remains one of the most confusing issues for employers because the DOL only proposed that employees must now make a "reasonable effort" (rather than "attempt") to schedule such leave so that it does not unduly disrupt the employer's operations. The DOL has thus far declined to permit employers to transfer or alter the duties of employees who need unscheduled intermittent leave. Also, despite suggestions from employers, it has so far declined to increase the minimum increment of intermittent leave.

- **Serious Health Conditions:** Employees with "Serious Health Conditions" would be required to seek 2 treatments within 30 days of becoming incapacitated. For chronic conditions that require "periodic" treatments, employees would have to seek such treatment at least 2 or more times per year.

- **Contacting Health Care Providers:** Employers would be able to directly contact the employee's health care provider for purposes of clarifying and authenticating their medical certifications. No employee consent would be necessary for purposes of authenticating a suspicious medical certification.

- **Return to Work Certifications:** Under the proposed rules, employers would be able to require that an employee's health care provider certify that the employee is able to perform certain essential job functions. For employees on intermittent leave, employers would be able to require fitness-for-duty certifications every 30 days in the event an employee has used intermittent leave during that period and safety concerns exist.

- **Substitution of Paid Leave:** The DOL proposes to clarify that employees substituting paid leave must comply with all employer policies and that for purposes of "substitution" paid leave and FMLA leave runs concurrently.

The DOL invites public comments on these proposed changes from employers up to April 11, 2008, after which it will issue final regulations. For hoteliers, these changes and proposed regulations to the FMLA expand the circumstances when an employer will be required to provide unpaid, but job protected leave, to eligible employees, in particular with employees with family members in the Armed Services. Employers should take this opportunity to review their FMLA and military leave policies and procedures to ensure compliance, including new posting requirements. ✧

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