

# The East Texas Employment Law Update

A Bi-Monthly Publication Dedicated to Discussing Employment Law Issues.

September, 2009

## 2009 FMLA Amendments - Part Two

In the May 2009, issue we discussed some of the amendments to FMLA regulations. In this issue, we are going to continue our focus on the non-military related changes to the FMLA. As we discussed in the May 2009 issue, the DOL has attempted to clarify some of the terminology used in the FMLA. The clarifications contained within the new regulations are sometimes pro-employer and sometimes not.

### **Serious Health Condition:**

To qualify as a serious health condition, the care must involve in-patient treatment or be continuous medical care. In-Patient care means an overnight stay in the hospital, hospice, or residential medical care facility including any period of incapacity or subsequent treatment in connection with such inpatient care. There are five different categories that come within the definition of continuing treatment:

Incapacity and Treatment: A period of incapacity of more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition that also involves: (1) treatment two or more times within 30 days of the first incapacity, unless extenuating circumstances exist, by a health care provider; or (2) treatment by a health care provider which results in a regimen of continuing treatment under the supervision of a health care provider. Of note, the first in-person treatment must occur within seven days of incapacity for this provision to apply.

### Pregnancy or prenatal care

Chronic Conditions: Chronic conditions are serious health conditions which: (1) Require at least two visits for treatment by a health care provider; (2) Continues over an extended period of time (including recurring episodes of a single underlying condition); and (3) May cause episodic rather than a continuing period of incapacity (asthma, diabetes, epilepsy, etc)

Permanent or Long Term Conditions: A period of incapacity which is permanent or long term due to a condition for which treatment may not be effective. Examples are Alzheimer's, severe stroke or the terminal stages of a disease

Conditions requiring multiple treatments: a period of absence to receive multiple treatments (including the period of recovery) by a health care provider or through the referral of the health care provider

Finally, absences which are attributable to pregnancy or a chronic condition even if the employee or the covered family member does not receive treatment from a health care provider during the absence qualify for FML.

### **Substance Abuse Treatment:**

Only the treatment, through a health care provider or at the referral of a health care provider, qualifies for FML. Absences due to the use of the substance do not qualify. Leave under FMLA does not prohibit the employer from taking employment action in the event the employee has violated a substance abuse policy that has been communicated to employees.

### **Leave for Pregnancy or Birth of a Child:**

Mother and father are entitled to leave for the birth of a child. The regulations are limited to husbands, not boyfriends or fiancés. Meaning, if the father is not married to the mother, then he is not entitled to leave under this provision to care for the mother while she is on bed rest, etc.

### **Leave for Adoption or Foster Care:**

This regulation remains unchanged. Employees are entitled to FML for the placement of a child.

### **Family member definitions:**

Spouse is defined as husband and wife or common law spouse

Parent is broadly defined but does not include "in laws."

Son or Daughter is also broadly defined

Next of Kin is the most broadly defined but fortunately only applies to issues with service members which will be discussed in the next issue

When an employee is requesting leave, the employer may require reasonably available documentation or a statement of family relationship. Such documentation can include a birth certificate, court documentation, marriage license, etc. The employee is entitled to return of the documentation once the employer examines it. The regulations do not address whether the employer can make a copy of the documentation. These definitions will take on added significance in the next issue when we address the military leave portions of the new regulations.

### *Analysis:*

*The most significant clarification from the regulations is that an employee with a substance abuse problem cannot request FMLA without a referral to treatment by a doctor. Further, the regulations clarified that FMLA cannot be used to avoid application of a substance abuse policy. Namely, an employee tests positive for a substance which requires his termination from employment but before he is terminated he invokes FMLA. The regulations clarified that an employer can terminate an employee if the employer has a substance abuse policy. Without a substance abuse policy that has been communicated to employees, an employer may face liability for terminating an employee for a positive drug test.*

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