PROPOSED REVISIONS TO FMLA REGULATIONS

TABLE OF CONTENTS

PROPOSED REVISIONS TO FMLA REGULATIONS

A. Proposed Reorganization

In an effort to make information contained in the regulations easier to locate, the DOL proposes reorganizing the regulations by: 1) combining all provisions addressing leave for pregnancy and childbirth in one section; 2) combing all provisions for adoption and placement of a child for foster care in one section; 3) combining all provisions relating to substance abuse in one section; and 4) combining all provisions relating to notice in one section. The DOL also proposes substantive revisions to the notice provisions, which are discussed in more detail below.

As a result of the reorganization, some provisions that are duplicative will be deleted.

The DOL also proposes rewording the section titles from question format to a descriptive title and seeks comments on whether this change is helpful.

B. Proposed Substantive Revisions

1. Exclusion of Some PEOs from Definition of Joint Employer (Proposed § 825.106)

Sections 825.106 and 825.111(a)(3) of the existing regulations govern employer coverage and employee eligibility in the case of joint employment and set forth the responsibilities of the primary and secondary employers. The DOL proposes amending § 825.106(b) by inserting a new paragraph to clarify how the joint employment rules apply to Professional Employer Organizations (PEOs).

Under the proposal, PEOs that contract with client employers merely to perform administrative functions – including payroll, benefits, regulatory paperwork, and updating employment policies – are not joint employers with their clients, provided they: do not have the right to exercise control over the activities of the client's employees, and do not have the right to hire, fire or supervise them, or determine their rates of pay, and do not benefit from the work that the employees perform.

If, however, in a particular fact situation a PEO has the right to hire, fire, assign, or direct and control the employees, or benefits from the work that the employees perform, such a PEO would be a joint employer with the client employer.

Although not addressed in the regulations, in the preamble to the proposed revisions the DOL notes that only those employees who are jointly employed must be counted for the purposes of determining employer coverage ("over 50 workers") and employee eligibility ("over 50 employees within 75 miles"). Thus, for example, the home office employees of the primary employer and the employees placed with other secondary employers are not included in employee counts for each secondary employer.

2. **Proposed Revisions to Eligibility Provision (Proposed § 825.110)**

a. **Hours Worked Prior to a Five Year Break in Service**

To be eligible for FMLA leave, an employee must have worked for an employer for at least 12 months, must have been employed for at least 1,250 hours of service during the 12 months preceding the leave, and must be employed at a worksite where 50 or more employees are employed by the employer within 75 miles of the worksite. The current regulations provide that the 12 months of employment do not have to be consecutive.

The DOL proposes a new § 825.110(b)(1) to provide that although the 12 months of employment need not be consecutive, employment prior to a continuous break in service of five years or more need not be counted. The DOL also proposes two exceptions to this new rule: 1) a break in service resulting from the employee's fulfillment of military obligations; and a period of approved absence or unpaid leave, such as for education or child-rearing purposes, where a written agreement or collective bargaining agreement exists concerning the employer's intent to rehire the employee. In these situations, employment prior to the break in service must be used in determining whether the employee has been employed for at least 12 months, regardless of the length of the break in service.

The DOL also proposes adding a paragraph stating that nothing prevents an employer from considering employment prior to a continuous break in service of more than five years when determining if an employee meets the 12-month employment criterion provided the employer does so uniformly with respect to all employees with similar breaks in service.

b. **Hours Spent on Military Leave**

The DOL proposes including a paragraph in § 825.110 stating that an employee returning from fulfilling his or her National Guard or Reserve military obligation shall be credited with the hours-of-

service that would have been performed but for the period of military service in determining whether the employee worked the 1,250 hours of service. This revision codifies the protections and benefits offered by the Uniformed Services Employment and Reemployment Rights Act (USERRA).

c. **Clarification of Eligibility that Occurs While on Leave**

Current § 825.110(d) states that eligibility determinations (that is, whether an employee has worked for the employer for at least 1,250 hours in the past 12 months and has been employed by the employer for a total of at least 12 months) must be made as of the date the leave commences. According to the preamble to the proposed revisions, this language has led to confusion when employees who have worked 1,250 hours, but have not fulfilled the 12 months of employment requirement, begin a block of leave. According to the preamble, although periods of leave do not count towards the 1,250 hour requirement because leave is not "hours worked," periods of leave do count towards the 12 months of employment requirement because the employment relationship continues, and has not been severed, during the leave. Thus, the DOL proposes a clarification, which states: "An employee may be on "non-FMLA leave" at the time he/she meets the eligibility requirements, and in that event, any portion of the leave taken for an FMLA qualifying reason after the employee meets the eligibility requirement would be "FMLA leave."

3. **Worksite of Employees Working for a Secondary Employer for More than One Year**

The current regulations provide that for the purposes of determining an employee's eligibility, when an employee is jointly employed by two or more employers, the employee's worksite is the primary employer's office from which the employee is assigned or reports. The DOL proposes modifying this provision to by adding " unless the employee has physically worked for at least one year at a facility of a secondary employer, in which case the employee's worksite is that location. The employee is also counted by the secondary employer to determine eligibility for the secondary employer's full-time or permanent employees." The DOL proposed this revision in light of the Tenth Circuit's decision in *Harbert v. Healthcare Services Group, Inc*., 391 F.3d 1140 (10th Cir. 2004), which held that the current regulation's definition of worksite as applied to an employee with a long term fixed worksite at a facility of the secondary employer, was arbitrary and capricious.

4. **Serious Health Condition (Proposed § 825.113)**

The FMLA defines serious health condition as either "an illness, injury, impairment, or physical or mental condition that involves – (A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider." The statute does not define "continuing treatment." The current regulations define continuing treatment as a "period of incapacity … of more than three consecutive calendar days … that also involves: treatment two or more times by a health care provider … or treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider."

Although the DOL acknowledged that it received a number of comments criticizing the regulatory definition of serious health condition and, most especially, the definition of "continuing treatment," it has retained these definitions. It has, however, reorganized the structure of the regulatory definition in an effort to make the definition clearer.

The DOL has retained the list of common ailments and conditions that ordinarily would not qualify as serious health conditions. The DOL notes that this sentence is not intended to create its own substantive definition of serious health conditions that categorically excludes the listed conditions. Instead it merely provides a list of examples of conditions that do not ordinarily meet the definition of serious health condition. If, however, these conditions meet the regulatory definition of serious health condition (for example, incapacity of more than three consecutive calendar days that also involves qualifying treatment), the absence would be protected by the FMLA.

5. **Continuing Treatment (Proposed § 825. 115)**

The DOL proposes to specify that the treatment "two or more times" by a health care provider occur within 30 days of the beginning of the period of incapacity unless extenuating circumstances exist. The 30-day requirement would replace the completely open-ended time frame under the current regulations.

Note, however, that the 30-day provision does not apply to the definition of continuing treatment that includes "[t]reatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment under the supervision of the health care provider."

Under the current regulations, a chronic serious health condition requires periodic visits for treatment; however, the regulations do not define the term "periodic." The DOL proposes including the discussion of chronic serious health condition in proposed § 825.115 and defining the term

periodic as "twice or more a year." According to the preamble, this is based on an expectation that employees with chronic serious health conditions generally will visit their health care provider at least that often, but may not visit them more often, especially if their condition is stable. The DOL seeks comments on whether this proposed definition is appropriate.

6. **Leave for Pregnancy or Birth (Proposed § 825.120)**

The DOL proposes creating a single section that addresses FMLA rights and responsibilities relating to pregnancy and the birth of a child. The DOL has combined language from several sections to make clear that a mother may be entitled to FMLA leave for both prenatal care and incapacity related to pregnancy and the mother's serious health condition following the birth of a child.

The proposed section restates that both the mother and father are entitled to FMLA leave for the birth of their child and for bonding with the child for the 12-month period following the child's birth. The proposed regulations further provide that an employee's entitlement to leave for a birth expires at the end of the 12-month period beginning on the date of the birth, unless state law allows, or the employer permits, leave to be taken for a longer period. This longer period of leave would not be FMLA leave.

As in the current regulations, the proposed new section states that a mother and father who are employed by the same employer and are both entitled to FMLA leave may only take a combined 12 weeks of leave for birth of the employee's son or daughter or to care for the child after birth, for placement of a son or daughter with the employee for adoption or foster care, or to care for the child after placement, or to care for the employee's parent with a serious health condition. A mother and father may each take 12 weeks of FMLA leave to care for the serious health condition of a child (if all of the FMLA's requirements are met). They are not limited to a combined 12 weeks of leave in this situation, even if they work for the same employer.

The new proposed section makes it clear that a father is entitled to FMLA leave if needed to care for his pregnant spouse who is incapacitated or for prenatal care, or if needed to care for the spouse following the birth of a child if the spouse has a serious health condition.

Currently the FMLA regulations provide that leave taken after the birth of a healthy newborn child may be taken on an intermittent or reduced leave schedule only if the employer agrees. The DOL proposes language emphasizing that if intermittent or reduced schedule leave is medically

necessary for a serious health condition of the mother or the newborn child, no employer agreement is necessary.

7. Adoption and Foster Care (Proposed § 825. 121)

The DOL proposes one section in which all provisions relating to adoption or foster care are consolidated. The DOL proposes a provision that leave for adoption or foster care may begin prior to the actual birth or adoption. Proposed § 825.121(a)(2) contains language from the current regulation explaining that leave for adoption or foster care must be completed within a year from the placement unless state law provides for a longer period of time or unless the employer agrees to a longer period of time. Such leave taken under state law or with an employer's agreement beyond the one-year period is not protected as FMLA leave.

The DOL also has added language to clarify that that husbands and wives working for the same employer are limited to a combined 12 weeks of leave for purposes of bonding with a healthy adopted or foster child, to care for the healthy child following the birth of the child, and to care for an employee's parent with a serious health condition. However, both spouses may take 12 weeks of leave to care for an adopted or foster child with a serious health condition.

The current regulations provide that leave taken after the placement of a healthy child for adoption or foster care may only be taken on an intermittent or reduced schedule basis if the employer agrees. The DOL proposes adding a statement that if intermittent or reduced schedule leave is needed to care for the serious health condition of the adopted or foster child, no employer agreement is necessary.

8. Definition of Spouse, Parent, Son or Daughter, Adoption and Foster Care (Proposed § 825.122)

The DOL proposes rewriting the provision defining "son or daughter" for clarity. Additionally, the DOL proposes revising the regulation to state that the determination of whether an adult child has a disability should be made at the time leave is to commence.

The DOL has also added a new section defining adoption as "legally and permanently assuming the responsibility of raising a child as one's own. The source of an adopted child (e.g., whether from a licensed placement agency or otherwise) is not a factor in determining eligibility for FMLA leave."

The current regulation states that in addition to a child's birth certificate or a court document, a simple statement from an employee is sufficient to establish a family relationship. The DOL proposes adding language clarifying that the statement by the employee as documentation should be

a sworn, notarized statement. The DOL also proposes adding the example of a submitted and signed tax return as evidence of a qualified family relationship because in the case of an *in loco parentis* relationship, it may be difficult to determine what kind of proof may be reasonable to establish such a relationship.

9. **Unable to Perform the Functions of the Position (Proposed § 825.123)**

The DOL does not propose any substantive revisions to this regulatory definition except to include language clarifying that the employer may provide a statement of the employee's essential functions to the employee's health care provider and to clarify that the employer may require that the health care provider's medical certification specify what functions the employee cannot perform.

10. **Needed to Care for a Family Member (Proposed § 825.124)**

The DOL proposes language that clarifies that the employee requesting FMLA leave to care for a family member with a serious health condition need not be the only person available to care for the family member.

11. **Definition of Health Care Provider (Proposed § 825.125)**

The DOL proposes adding physicians' assistants to the list of recognized health care providers and eliminating the requirement that PAs operate without supervision by a doctor or health care provider.

12. **Amount of Leave (Proposed § 825.200)**

The DOL proposes clarifying that if an employee needs less than a full week of FMLA leave and a holiday falls within the partial week of leave, the employer should not count the hours the employee does not work on the holiday against the employee's FMLA entitlement if the employee would not otherwise have been required to work on the holiday. If, however, an employee needs a full week of leave in a week with a holiday, the hours the employee does not work on the holiday will count against the employee's FMLA entitlement.

13. **Scheduling Intermittent or Reduced Schedule Leave (Proposed § 825.203)**

The DOL proposes clarifying that an employee must make a "reasonable effort" rather than "attempt" to schedule planned intermittent or reduced schedule leave so as not to unduly disrupt the employer's operations.

14. **Increments of Leave for Intermittent or Reduced Schedule Leave (Proposed § 825.205)**

Although the DOL received a number of comments from employers reflecting problems managing intermittent leave in the smallest increments an employer's payroll system can use, it is not proposing any changes to the minimum increment of intermittent leave at this time.

The DOL seeks comments regarding whether an employee who works a job that cannot be commenced in mid-shift (such as flight attendants and rail or bus operators) should have the entire shift counted against their FMLA leave entitlement.

The DOL does not propose revising the current regulations to address overtime hours. In the preamble to the proposed revisions, however, the agency states that if an employee would be required to work overtime if he or she was not entitled to FMLA leave, the hours of overtime not worked should be counted against the employee's FMLA entitlement.

15. **Substitution of Paid Leave (Proposed § 825.207)**

The DOL proposes language stating that the terms and conditions of an employer's paid leave policies apply and must be followed by the employee in order to substitute any form of accrued paid leave, including, for example, paid vacation, personal leave, family leave, "paid time off" (PTO), or sick leave. The DOL proposes deleting language in the current regulation stating that the employer may not place limitations on substitution of paid vacation or personal leave, including leave earned or accrued under PTO plans, in light of the proposal that all types of paid leave be treated the same and that the terms and conditions of the employer's paid leave policies must be followed.

The DOL also proposes to add language clarifying that for FMLA purposes "substitution" means that the unpaid FMLA leave and the paid leave provided by an employer run concurrently. According to the DOL, this is standard practice under the current regulations and is not a change in enforcement policy.

The DOL also proposes to add language clarifying that, when providing notice of eligibility for FMLA leave to an employee pursuant to proposed § 825.300, an employer must make the employee aware of any additional requirements for the use of paid leave and must inform the employee that he/she remains entitled to unpaid FMLA leave even if he/she chooses not to meet the terms and conditions of the employer's paid leave policies (such as using leave only in full day increments or completing a specific leave request form). The DOL invites comment as to whether this proposal appropriately implements Congressional intent regarding substitution of paid leave.

Additionally, the DOL proposes deleting language in the current regulations stating that when an employer's procedural requirements for taking paid leave are less stringent than the requirements of the FMLA, employees cannot be required to comply with higher FMLA standards. In the preamble, the DOL notes that this provision does not implement the purposes of § 103 of the FMLA, which states that employers may require sufficient FMLA certification in support of any request for FMLA leave for either the employee's own serious health condition or a covered family member's serious health condition.

Although the DOL does not propose revising the current language stating that substitution of paid leave does not apply where the employee is receiving paid disability leave, comments in the preamble clarify that while the substitution provisions are not applicable when an employee receives disability benefits while taking FMLA leave, if the employer and employee agree to have paid leave also run concurrently with FMLA leave to supplement disability benefits, such as in the case where an employee only receives two-thirds of his or her salary from the disability plan, such an agreement is permitted under FMLA to the degree that it is allowable under applicable State law.

The DOL also proposing language permitting public sector employees to substitute accrued compensatory time to run concurrently with unpaid FMLA leave when leave is taken for a FMLA qualifying reason.

16. **Employee Failure To Make Health Premium Payments (Proposed § 825.212)**

The DOL proposes adding language to this section to make clear that if an employer allows an employee's health insurance to lapse due to the employee's failure to pay his or her share of the premium as set forth in the regulations, the employer still has a duty to reinstate the employee's health insurance when the employee returns to work and can be liable for harm suffered by the employee if it fails to do so.

17. **Equivalent Position (Proposed § 825.215)**

The DOL proposes revising this section to permit employers to deny payment of a bonus based on the achievement of a specified goal, such as hours worked or perfect attendance, if the employee fails to achieve that goal as a result of an FMLA absence, unless the bonus or award is paid to employees on an equivalent non-FMLA leave status.

18. **Protections for Employees who Request Leave or Otherwise Assert FMLA Rights (Proposed § 825.220)**

a. **Remedies**

The DOL proposes language setting forth the remedies for interfering with an employee's rights under the FMLA.

b. **Light Duty**

The DOL proposes deleting language that states that job restoration rights are available until 12 weeks have passed within the 12-month period including all FMLA leave taken and the period of light duty. This is an effort to ensure that employees retain their right to reinstatement for a full 12 weeks of leave instead of having the right diminished by the amount of time spent in a light duty position.

In the preamble, the DOL states that it is not proposing to require employees to accept light duty work in lieu of taking FMLA leave. According to the DOL, if an employee is voluntarily performing a light duty assignment and performing work, the employee is not on FMLA leave and the employee should not be deprived of future FMLA-qualifying leave when performing such work.

The DOL invites comments on whether the deletion of this language may negatively impact an employee's ability to return to his or her original position from a light duty position.

c. **FMLA Waivers**

The DOL proposes clarifying language regarding waivers to explicitly state that the prohibition on waivers does not prevent the settlement of past FMLA claims by employees without the approval of a court or the DOL. The DOL proposes this language in reaction to the Fourth Circuit's position in *Taylor v. Progress Energy*, which held that the waiver language in the regulations prevents employees from independently settling past claims for FMLA violations with employers without the approval of the DOL or a court.

19. **Employer Notice Requirements (Proposed § 825.300)**

The DOL proposes to collect the notice requirements into one comprehensive section addressing an employer's notice obligations. Proposed § 825.300 is divided into separate paragraphs that address the major topics of "(a): general notice"; "(b): eligibility notice"; "(c): designation notice"; and "(d): consequences of failing to provide notice".

a. **General Notice**

The "general notice" requirement requires an employer to post a notice explaining the Act's provisions and complaint filing procedures, and to provide this same notice in employee

handbooks or by distributing a copy annually. To streamline the current notice and posting requirements, the DOL proposes that one document containing identical information be both posted and distributed.

The DOL proposes permitting employers to satisfy the posting requirement by an electronic posting of the notice as long as it otherwise meets the requirements of this section. The DOL seeks comments regarding whether this posting alternative is considered workable and will ensure that employees and applicants obtain the required FMLA information.

The DOL has proposed a prototype notice that has been revised to provide employees more useful information on their FMLA rights and responsibilities.

b. **Eligibility Notice**

The proposed "eligibility notice" provision requires employers to notify employees regarding whether the employee is eligible for FMLA leave and whether the employee still has FMLA leave available in the current 12-month period. If the employee is not eligible or has no FMLA leave available, the notice must indicate the reasons why the employee is not eligible, including, as applicable:

- the employee has no remaining FMLA leave available in the 12-month period,
- the number of months the employee has been employed by the employer,
- the number of hours of service during the 12-month period, and
- whether the employee is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite.

If the employee is eligible for FMLA leave and has FMLA leave available, the notice must detail the specific expectations and obligations of the employee and explain the consequences of failure to meet these obligations. Specifically, the notice must include the following information as appropriate:

- That the leave may be designated and counted against the employee's annual FMLA leave entitlement;
- Any requirements for the employee to furnish medical certification of a serious health condition and the consequences of failing to do so;

- The employee's right to substitute paid leave, whether the employer will require the substitution of paid leave, the conditions related to any substitution, and the employee's entitlement to take unpaid FMLA leave if the employee does not comply;
- Any requirement to make premium payments for health benefits and the possible consequences for failing to do so;
- Any requirement to present a fitness for duty certification to be reinstated and a list of the essential functions of the employee's position if the employer will require that the fitness for duty certification address those functions;
- The employee's status as a ''key employee'' and the potential consequence that restoration may be denied following FMLA leave, explaining the conditions required for such denial;
- The employee's rights to maintenance of benefits during the FMLA leave and restoration to the same or an equivalent job upon return from FMLA leave;
- The employee's potential liability for payment of health insurance premiums paid by the employer during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave.

The proposed regulations require that the eligibility notice be conveyed within five business days after the employee either requests leave or the employer acquires knowledge that the employee's leave may be for an FMLA-qualifying reason.

The DOL seeks comments on whether this timeframe will impart sufficient information to employees in a timely manner and whether it is workable for employers.

The DOL has proposed a prototype eligibility notice form that employers can adapt to their obligations.

c. **Designation Notice**

The proposed designation notice provision requires that within five business days of having obtained sufficient information to determine whether the requested leave is being taken for a qualifying reason, the employer must provide the employee with a notice informing the employee of whether the leave requested will be designated as FMLA leave. The notice should also provide the number of hours, days, or weeks of leave that will be counted against the employee's FMLA entitlement, if possible. If it is not possible to provide the hours, days or weeks that will be counted against the employee's FMLA leave entitlement (such as in the

case of unforeseeable intermittent leave), such information must be provided every 30 days to the employee if leave is taken during the prior 30-day period. If the employer requires paid leave to be substituted for unpaid leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, this designation also must be made at the time of the FMLA designation.

The DOL has proposed a prototype designation notice that employers may use.

20. Employer Designation of FMLA Leave (Proposed § 825.301)

The DOL's proposed revisions maintain the basic requirement from current § 825.208 that employers designate qualifying leave as FMLA promptly and notify employees of that designation. The revisions, however, account for the Supreme Court's ruling in *Ragsdale* prohibiting categorical penalties based on an employer's failure to appropriately designate FMLA leave. The DOL proposes language acknowledging that retroactive designation of FMLA leave may occur, but if an employee establishes that he or she has suffered harm as a result of the employer's actions, a remedy may be available.

21. Employee Notice Requirements for Foreseeable FMLA Leave (Proposed § 825.302)

The DOL proposes retaining the current requirement that an employee provide 30 days notice when the need for FMLA leave is foreseeable and provide notice as soon as practicable when the need for leave is foreseeable but 30 days notice is not practicable. Where the employee provides less than 30 days notice, the DOL proposes language requiring the employee to respond to a request from the employer and explain why 30 days notice was not practicable.

The DOL also proposes deleting language that defines as soon as practicable as "ordinarily . . . within one or two business days of when the need for leave becomes known to the employee" and, instead, providing examples clarifying the employee's obligation to provide notice as soon as practicable.

The DOL also proposes requiring the employee to provide sufficient information to make an employer aware that FMLA rights may be at issue. Although the DOL proposes retaining the standard that an employee need not specifically mention the FMLA, it also proposes requiring the employee to provide sufficient information indicating that a condition exists that renders the employee unable to perform the functions of the job, or if the leave is for a family member, that the condition renders the family member unable to perform daily activities; the anticipated duration of the absence; and whether the employee or the employee's family

member intends to visit a health care provider or has a condition for which the employee or the employee's family member is under the continuing care of a health care provider.

Additionally, the DOL proposes language specifically stating that the failure to respond to reasonable inquiries by the employer may result in denial of FMLA protection if the employer is unable to determine whether the leave is FMLA qualifying.

The DOL seeks comment as to whether a different notice standard requiring employees to expressly assert their FMLA rights should apply in situations in which an employee has previously provided sufficient notice of a serious health condition necessitating leave and is subsequently providing notice of dates of leave due to the condition that were either previously unknown or changed.

Call-in Procedures: The DOL proposes that, absent unusual circumstances, employees may be required to follow established call-in procedures (except one that imposes a more stringent timing requirement than the regulations provide), and failure to properly notify employers of absences may cause a delay or denial of FMLA protections. However, FMLA-protected leave cannot be delayed or denied for failure to meet the employer's timing standard where the standard is more stringent than those established in the regulations.

22. **Notice of Unforeseeable Leave (Proposed § 825.303)**

In the case of unforeseeable leave, the DOL proposes to maintain the requirement that an employee provide notice as soon as practicable under the facts and circumstances of the particular case and proposes language clarifying that employees are expected to provide notice to their employers promptly.

The DOL proposes to require that the employee provide the employer with sufficient information to put the employer on notice that the absence may be FMLA-protected. Sufficient information is defined as information that indicates that a condition renders the employee unable to perform the functions of the job, or if the leave is for a family member, that the condition renders the family member unable to perform daily activities; the anticipated duration of the absence; and whether the employee or the employee's family member intends to visit a health care provider or has a condition for which the employee or the employee's family member is under the continuing care of a health care provider.

In addition the DOL proposes language clarifying that calling in with the simple statement that the employee or the employee's family member is "sick" without providing more information will not be considered

sufficient notice to trigger an employer's obligations under the Act in the case of unforeseeable leave.

The DOL also proposes including in this section language similar to that in the provision for foreseeable leave, which states that employees have an obligation to respond to an employer's questions designed to determine whether an absence is potentially FMLA-qualifying and that failure to respond to reasonable employer inquiries regarding the leave request may result in denial of FMLA protection if the employer is unable to determine whether the leave is FMLA-qualifying.

The DOL seeks comments as to whether a different notice standard requiring employees to expressly assert their FMLA rights should apply in situations in which an employee has previously provided sufficient notice of a serious health condition necessitating leave and is subsequently providing notice of dates of leave due to the condition that were either previously unknown or changed.

23. **Medical Certification (Proposed § 825.305)**

The DOL proposes changing the time in which the employer must request medical certification from the employee from within two days to within five days of receiving notice of the need for leave.

The DOL proposes defining an insufficient certification as one where the information provided is "vague, ambiguous or non-responsive." The DOL also proposes allowing an employee the opportunity to provide sufficient certification where the initial certification is either incomplete or insufficient. Additionally, the DOL proposes requiring an employer to state in writing what additional information is necessary and give the employee seven days to cure the deficiency, where the employer determines that the medical certification is either incomplete or insufficient. The DOL also proposes language stating that a medical certification never submitted to an employer is not incomplete or insufficient but is a failure to provide certification.

The DOL proposes language setting forth the consequences if an employee fails to provide a complete and sufficient medical certification and reiterating the standard under which an employer may deny leave. It clarifies that it is the employee's responsibility either to provide a complete and sufficient certification or to furnish the health care provider providing the certification with any necessary authorization from the employee or the employee's family member – such as that required by the Health Insurance Portability and Accountability Act (HIPAA) Privacy Regulations – in order for the health care provider to release a sufficient and complete certification to the employer to support the employee's FMLA request.

The DOL seeks comments on all aspects of the proposed notice provisions.

24. Content of Medical Certification (Proposed § 825.306)

In the preamble to the proposed revisions, the DOL addresses the impact of the HIPAA Privacy Rule on the medical certification provision. According to the DOL, if the employee has the health care provider complete the medical certification form or a document containing the equivalent information and personally requests a copy of that form to take or send to the employer, the HIPAA Privacy Rule does not and should not impede the disclosure of the protected health information. If the employee asks the health care provider to send the completed certification form or medical information directly to the employer or the employer's representative, however, the HIPAA Privacy Rule will require the health care provider to receive a valid authorization from the employee before the health care provider can share the protected medical information with the employer.

a. Proposed Revisions to Medical Certification Requirements

The DOL declined to create multiple medical certification forms as suggested by some commentators (for intermittent leave, block leave, leave to care for a family member, etc.); however, the agency seeks feedback as to whether multiple forms would be clearer than the revised form it has proposed in this rulemaking.

The DOL proposes to revise the medical certification requirements as follows:

- The DOL proposes to require the health care provider's specialization and fax number, in addition to the provider's name, address and type of medical practice.
- The DOL has added guidance in the regulations regarding what constitutes appropriate medical facts regarding the patient's condition for which FMLA leave is required. Appropriate medical facts include information such as symptoms, hospitalization, doctors visits, whether medication has been prescribed, referrals for evaluation or treatment, or any other regimen of continuing treatment.
- The proposed revisions would allow the health care provider to include a diagnosis of the patient's condition. However, the DOL does not require a diagnosis if sufficient medical facts are set forth by the health care provider to establish the need for FMLA leave.

- The proposed revisions require the health care provider to provide sufficient information to establish that the employee cannot perform the essential functions of his or her job and the likely duration of such inability.
- The proposed revisions require the health care provider to certify that intermittent leave or reduced schedule leave is medically necessary.

The DOL proposes eliminating language in the regulations that prohibits employers from seeking the above information if the employer's sick leave plan requires less information. The DOL proposes incorporating information from the current regulations that explains the interaction between workers' compensation and the FMLA and including a provision that states that if the employer may request additional information from the workers' compensation health care provider, the FMLA does not prohibit the employer from following the workers' compensation provisions.

b. **Interaction between the ADA and FMLA**

The DOL proposes adding a section that clarifies that where a serious health condition may also be a disability, employers are not prevented from following the procedures under the ADA for requesting medical information.

c. **Medical Release Forms**

The DOL proposes a new section clarifying that employees are not required to sign a release of medical forms as a condition of taking FMLA leave.

25. **Authentication and Clarification of Medical Certification (Proposed § 825.307)**

The DOL proposes removing the employee consent requirement for an employer to obtain authentication of the medical certification form.

With regard to clarification, the DOL states that HIPAA disclosure requirements have supplanted the current regulations' requirement that the employee give permission to clarify the certification. Thus, the DOL proposes language highlighting that contact between the employer and the employee's health care provider for the purposes of clarifying medical certification must comply with the HIPAA Privacy Rule. Additionally, the DOL proposes eliminating the requirement that the employer's health care provider, as opposed to the employer itself, make the contact with an employee's health care provider during the medical certification. In the preamble, the DOL notes that such contact by the employer may only take

place after the employee has been afforded the opportunity to cure any deficiencies with the certification.

The DOL proposes language requiring employees (or family members where appropriate) to authorize the release of medical information regarding the condition for which leave is sought from the employee's (or family member's) health care provider to the second or third opinion provider.

26. **Recertification (Proposed § 825.308)**

The DOL proposes changing the current recertification regulation to permit employers to obtain recertifications every six months in circumstances in which the certification indicates that the condition will last for an extended period of time. An extended period of time includes not only specific months or years (e.g., one year) but certified durations of "indefinite," ''unknown," or "lifetime."

The DOL also proposes explaining what circumstances must exist to permit an employer to request recertification in less than thirty days.

27. **Fitness-for-Duty Certification (Proposed § 825.310)**

The proposed regulations retain the basic fitness-for-duty certification procedures, but state that for purposes of authenticating and clarifying the fitness-for-duty statement, the employer may contact the employee's health care provider consistent with the procedures for obtaining a second medical opinion. The proposal also replaces the requirement that the certification be a "simple statement" with the statutory language that the employee must obtain a certification from his or her health care provider that the employee is able to resume work.

The DOL proposes that an employer be permitted to require an employee to furnish a fitness-for-duty certificate every 30 days if an employee has used intermittent leave during that period and reasonable safety concerns exist.

The DOL requests comments on these issues.

28. **Failure to Provide Medical Certification for Foreseeable Leave (Proposed § 825.311)**

The DOL proposes amending the provision relating to medical certification of foreseeable leave to state that if the employee fails to provide sufficient medical certification for foreseeable leave, the employer may deny FMLA coverage for the period at issue. This is a change from the current provision, which says that the employer may "delay the taking

of FMLA leave." The DOL proposes similar changes to the paragraph addressing unforeseeable leave.

29. **When Can an Employer Refuse Reinstatement (Proposed § 825.312)**

Current §§ 825.312(a) through (f) address when an employer can delay or deny FMLA leave to an employee, or deny reinstatement after FMLA leave, when an employee fails to timely provide the required notifications and certifications set forth in the regulations. Because these provisions are duplicative of other provisions in the regulation, the DOL proposes deleting them.