Special Report

Family and Medical Leave

Employer groups are pressing for revisions in the Family and Medical Leave Act, which they say has become overly burdensome.

Employers Continue to Push for Revisions in FMLA Regulations

Under the Bush administration, the Labor Department has achieved a major victory with its revisions to the Fair Labor Standards Act's overtime rules but, much to the chagrin of employer groups, has no immediate plans to amend the Family and Medical Leave Act regulations.

Frustrated by the solicitor of labor's recent failure to commit to pursuing changes to FMLA regulations, the chairman of a House oversight panel has turned to the Office of Management and Budget for details regarding the Bush administration's plans to address concerns with the rules.

The regulations implementing the 1993 leave law have been the focus of extensive public comment to OMB since the agency in 2001 started soliciting input on and recommending review of specific "high priority regulatory policy issues." However, at a Nov. 17 hearing called by a panel of the House Government Reform Committee, Labor Solicitor Howard Radzely was unable to provide information about what, if any, actions the Labor Department would take to address employers' complaints about the rules.

Radzely was asked to participate in the hearing specifically to address concerns about FMLA regulations that went into effect during the Clinton administration. The Labor Department has held stakeholder meetings to discuss the rules and has invited more than 20 groups, including unions and employer associations, to comment, the labor solicitor told the subcommittee.

"We hope to have a decision sometime next year as to what, if any, action to take," Radzely said. He would not, however, elaborate further when pressed about whether those decisions would be made "in January or December."

In response to a question from Rep. Doug Ose (R-Calif.), chairman of the House Government Reform Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs, Radzely said, "If there are discreet actions, I presume the department will take them at the appropriate time."

Ose, in turn, contacted John Graham, administrator of OMB's Office of Information and Regulatory Affairs, questioning whether OMB has tracked "the Labor Department's progress" in "reforming FMLA's implementation" and, "If not, why not?" Ose also asked in his Nov. 18 letter that OMB inform him of its view of various problems associated with the FMLA regulations, such as burdensome paperwork and recordkeeping requirements.

Definition of 'Serious Health Condition.' A hospital administrator who testified on behalf of the Society for Human Resource Management (SHRM) recounted for Ose's subcommittee the key difficulties employers have encountered since the final FMLA rules took effect.

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NANCY MCKEAGUE, REPRESENTING SHRM

Chief among those complaints is the "expansive regulatory definition and varying interpretations of what constitutes a 'serious health condition' " qualifying for leave under the law, according to Nancy McKeague, senior vice president of the Michigan Health and Hospital Association.

FMLA, which took effect Feb. 5, 1993, requires businesses with 50 or more employees to grant up to 12 weeks of unpaid leave a year to allow workers to care for seriously ill family members, give birth to or adopt a child, or recover from their own serious health conditions.

Although Congress, in enacting the FMLA, made clear that the term "serious health condition" was not intended to cover short-term conditions for which treatment and recovery are

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very brief, the Labor Department regulations as originally developed by President Clinton's administration "do not follow Congress' intent," McKeague said.

"Essentially, the broad definition mandates FMLA leave in situations where an employee sees a health care provider once, receives a prescription drug, and is instructed to call the health care provider back if the symptoms do not improve," McKeague said. "The regulations also define as a 'serious health condition' any absence for a chronic health problem, such as arthritis, asthma, or diabetes, even if the employee does not see a doctor for that absence and is absent for fewer than three days," she added.

"Inclusion of all these various absences in the definition of 'serious health condition' has inadvertently changed the FMLA statute into a national sick leave policy—something that Congress specifically sought to avoid," McKeague said.

Intermittent Leave Issues. SHRM and other business groups also are critical of the Labor Department's failure to limit increments of intermittent leave taken under the law to a half-day minimum. Under the current regulations, an employer is required to let employees take FMLA leave in increments that are as short as the shortest period of time the employer's payroll system uses to account for absences of leave, provided the system can track time in increments of one hour or less, the U.S. Chamber of Commerce recently wrote OMB.

"Employers, many of which have payroll systems capable of tracking time in periods as small as six minutes, find tracking leave in such small increments extremely burdensome," the chamber wrote. The employer group also complained that scheduling around intermittent leave is virtually impossible "because the regulations do not require the employee to provide advance notice of specific instances of intermittent leave."

The chamber argued that the FMLA regulations need to be amended to allow employers to limit leave to a minimum of half-day increments. According to the chamber, limiting leave to a minimum of half-day increments will greatly reduce the recordkeeping burden associated with tracking use of intermittent leave.

In addition, the chamber urged that the FMLA regulations be revised "so they require that employees provide at least one week advance notice of the need for intermittent leave except in cases of emergency, in which case they must provide notice on the day of the absence, unless they can show it was impossible to do so." Requiring such notice "will reduce employer costs and burdens incurred because of unpredictable employee absences," the chamber said.

Penalty Provisions. Claiming that the Labor Department's "inconsistent and vague interpretations" of FMLA have "led to a litigation explosion," the FMLA Technical Corrections Coalition said the validity of regulations implementing the law have been challenged in 68 lawsuits. "Had the Department of Labor more closely reflected the intent of Congress in its FMLA implementing regulations in the first place, this litigation and confusion could have been avoided," the group wrote OMB earlier this year.

The FMLA Technical Corrections Coalition was founded by SHRM with the mission of making application of the FMLA consistent with the original intent of the law.

In its submission to OMB, the coalition warned that an "increasing number of lawsuits challenging FMLA regulations are expected" in the wake of the Supreme Court's 2002 decision in *Ragsdale v. Wolverine Worldwide Inc. (PBD 55, 3/21/02; 29 BPR 995, 3/26/02; 27 EBC* 1865). In *Ragsdale*, the court invalidated an FMLA regulation—29 C.F.R. 825.700(a)—that precluded leave from being counted against an employee's FMLA entitlement when an employer failed to designate paid or unpaid leave as FMLA leave.

The court faulted the rule for "punish[ing] an employer's failure to provide timely notice of the FMLA designation by denying it any credit for leave granted before the notice," without requiring any evidence that the employee's interests were harmed by the failure to receive notice. According to the court, the rule was incompatible with the FMLA's statutory liability and remedial provisions and exceeded the secretary of labor's authority to issue rules implementing the act.

There "are a number of other [FMLA] regulations that impose 'across the board' penalties that will not meet the Court's standard" set in *Ragsdale* and "will be invalidated using the same rationale," according to the coalition. If the department does not amend its "problematic interpretations" of FMLA, "continued adherence with these interpretations likely will result in unnecessary litigation that will cost all parties (employees, employers, unions, and the courts) additional time, effort and money," it said.

Other changes the coalition sought would:

- require employees to apply for FMLA leave when the need for leave is foreseeable, as with employer-provided leave;
- permit employers to require employees to choose between taking leave under the FMLA or paid absences afforded under collective bargaining agreements, sick leave policies, or disability plans;
- allow employers to verify the need for FMLA leave the same way they verify other employee absences for illness and to communicate with health care providers in order to clarify or authenticate medical certification substantiating claims that the need for leave is covered under the law;
- limit FMLA leave to situations in which an employee is unable to perform the majority of the functions of his or her job, rather than allowing employees to take FMLA leave when they are restricted from performing just one of their jobs' essential functions; and
- clarify that employers may record FMLA leave as absences for purposes of perfect attendance awards.

Regulatory Agenda. The Labor Department in the last few years has designated proposed revisions to FMLA regulations a top priority, but repeatedly has delayed target dates for announcing those revisions. In its last semiannual regulatory agenda, published in late June, the Labor Department said it intended to publish proposed changes to the rules in March 2005, that those changes would address issues raised in recent judicial decisions interpreting the law's requirements, and that the changes are necessitated, in large part, by *Ragsdale*.

Although the Bush administration first planned to announce revisions to the 1993 leave law's regulations in January 2003, that deadline proved unrealistic, as did subsequent plans to propose changes by the end of May 2003 and then by the end of June 2004. Labor Department officials acknowledged in early 2004 that the de-

partment's push to complete revisions to the FLSA's overtime rules had overtaken other regulatory priorities. The new FLSA rules took effect last August.

"After completing a review and analysis of the Supreme Court's decision in *Ragsdale* and other judicial decisions, regulatory alternatives will be developed for notice-and-comment rulemaking," the Labor Department said last June.

Radzely acknowledged that federal courts have "invalidated several provisions" of FMLA regulations, specifically citing both the Supreme Court's decision in *Ragsdale* and the U.S. Court of Appeals for the Seventh Circuit's decision in *Dormeyer v. Comerica Bank-Ill.* (PBD 147, 7/31/00; 27 BPR 1830, 8/1/00). In *Dormeyer*, the Seventh Circuit invalidated an FMLA regulation stating that "if the employer fails to advise the employee of whether the employee is eligible [for family leave] prior to the date the requested leave is to commence, the employee will be deemed eligible." The court described the regulation as "not only unauthorized" by the statute, but "unreasonable."

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