



LEGAL AND LEGISLATIVE UPDATE: MARCH 2007

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SHRM SUBMITS COMMENTARY ON THE FMLA

On Friday, February 16, 2007, the Society for Human Resource Management submitted commentary to the Department of Labor on behalf of its membership suggesting a variety of recommendations to improve the Family and Medical Leave Act.

Among other things, SHRM's comments focused on the troublesome definition of a "serious health condition" and recommended that the definition be clarified to cover situations in which an employee is unable to work for five or more business days. The goal of such a change would be to return to the original intent of Congress that the FMLA not be used for routine, minor illnesses.

SHRM also sought to address some of the more difficult aspects of FMLA administration and the use of intermittent leave. SHRM has suggested that leave be used in at least a minimum increment of a half day, to help employers manage absences and the loss of productivity caused by unscheduled intermittent FMLA leave. Another suggestion was to coordinate the FMLA with other laws, such as the Americans with Disabilities Act, and allow employers to contact an employee's healthcare provider to seek clarification of an employee's medical information.

It is unclear how the DOL will respond to the comments received, particularly in light of the ongoing efforts in Congress to expand FMLA coverage. To date, the DOL has indicated that it will carefully review the comments submitted, but has not committed to a timeframe for its review or that it will be promulgating new regulations.

NEW ELECTRONIC DISCOVERY RULES EFFECT ALL EMPLOYERS

Changes to the Federal Rules of Civil Procedure that took effect on December 1, 2006 will have a significant impact on every business and employment litigation in particular. The changes relate to electronic discovery and alter the way litigation will proceed.

The greatest concern for employers is the sheer volume of electronically-recorded information that exists in the workplace. Things like email, voice mails, website information and the like will almost always be the subject of disclosure in litigation as part of the discovery

process and therefore must be properly preserved. Failure to retain this information and produce it during the course of litigation can result in sanctions and could jeopardize an employer's defenses.

Thus, now is the time for all employers to examine these issues, before a lawsuit is filed. Among other things, employers should work with counsel to develop appropriate document retention policies and to integrate IT staff in such discussions. If litigation has begun or is likely, employers must be careful to preserve electronic information and communicate to its employees their obligation to comply with and observe preservation requirements.

For more specific guidance on these issues, you may reach Mr. Gold at (717) 237-6702 or by email at kgold@rhoads-sinon.com.