

# HALL | FARLEY

HALL, FARLEY, OBERRECHT & BLANTON, P.A.

JANUARY/FEBRUARY 2008



## EMPLOYER UPDATE

### FAREWELL FROM CANDY

*Over more than 20 years, I have written countless articles on a variety of employment law topics and developments in the law. In this piece, I am writing to thank you for reading those articles and, more so, for being a client and friend. I also thank you for trusting me and others at the firm to provide advice by counseling through a difficult workplace scenario, providing training for your employees, reviewing your handbooks and policies, and advocating for you in administrative proceedings and in litigation.*

*Although I am leaving in early March to serve as U.S. Magistrate Judge for the District of Idaho beginning March 30, several lawyers here at Hall Farley will be continuing or expanding their employment law practice. Those involved in employment and related business litigation primarily include Rich Hall, Kevin West, Kevin Scanlan, Keely Duke, Karen Sheehan, Portia Jenkins, Sarah Arnett and Dylan Eaton. Administrative proceedings and the counseling, policy review and workplace training is handled primarily by Kevin West, Keely Duke, Karen Sheehan and Sarah Arnett.*

*I also want to thank you for attending our past Bagels and Briefs morning sessions on employment law topics. Those too will continue. Our next session on February 28 will allow you an opportunity to learn more or update your knowledge on three topics, as well as meet Kevin West, Keely Duke and Karen Sheehan, if you haven't already done so. Please note that we are trying a new location, the Courtyard by Marriott in Meridian. I hope to see many of you that morning to tell you in person how much I have appreciated working with you and to assure you that you and your business will remain in good hands at Hall Farley.*

*~ Candy W. Dale*

### FMLA HOT TOPICS

*By Karen O. Sheehan and Sarah H. Arnett*

Family leave has recently become a hot topic. On January 28, 2008, President George Bush signed into law a defense authorization bill that includes a provision amending the Family and Medical Leave Act ("FMLA") to extend FMLA protections to some fam-

ily members and caregivers of U.S. soldiers. In addition, the U.S. Department of Labor ("DOL") issued proposed changes to the FMLA regulations on February 11, 2008. As a result, employers will need to review their FMLA policies during 2008 to ensure

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they are keeping up with all of these recent changes.

### EXPANSION OF THE FMLA TO PROVIDE LEAVE FOR MILITARY FAMILIES

Caring for our wounded soldiers has increasingly become a primary concern for the nation's lawmakers at both the state and federal levels. In addition, the deployment of spouses, parents, and children has created circumstances in which family members of service men and women need to take leaves of absence to care for loved ones. As a result, on Monday, January 28, 2008, the President



signed into law the first expansion of the FMLA since its enactment 15 years ago. The new legislation is intended to address the special circumstances faced by family members of U.S. soldiers.

Under the new law, FMLA eligible employees will be entitled to up to 26 weeks of unpaid FMLA-protected leave during a single 12-month period for an immediate family member caring for a recovering service member. A "recovering service member" is defined as a member of the Armed Forces who suffered an injury or illness while on active duty that may render the person unable to perform the duties of the member's office, grade, rank or rating. This expansion applies broadly to include care for service personnel who are undergoing medical treatment, recuperation, or therapy, or are in outpatient status, or otherwise on the temporary disability retired list, for serious injury or illness. For this type of leave, the legislation expands the definition of "covered employee" to include the "next of kin" or nearest blood relative, of a covered service member.

The FMLA expansion also makes eligible for leave a new category of employees who have imme-

diately family members called to active duty, apparently without regard to any medical issues. This benefit provides 12 weeks of FMLA leave to an employee with a spouse, son, daughter or parent being called to active duty with the Armed Forces. In this case, leave may be used for any "qualifying exigency" arising out of the service member's current tour of active duty or because the service member is notified of an impending call to duty in support of a contingency operation. An employer may require that a request for such leave be supported by a certification showing that the service member has actually been called to active duty.

While the DOL will need to issue regulations to fully implement this new law (see below), they have released information indicating that the caregiver provision of the law is effective as of January 28, 2008. However, the call to active duty provision will **not** become effective until the Secretary of Labor issues final regulations defining "any qualifying exigency." In the meantime, the DOL is encouraging employers to provide this type of leave to qualifying employees.

### PROPOSED FMLA REGULATIONS RELEASED

The DOL published long-awaited proposed changes to the FMLA regulations in the *Federal Register* on Feb. 11, 2008. Some of the major modifications are as follows:

**The *Ragsdale* Decision/Penalties:** The DOL's proposed rules include a number of technical regulatory changes to reflect current law following the U.S. Supreme Court's decision in *Ragsdale v. Wolverine World Wide, Inc.*, which invalidated a penalty provision of the regulations. *Ragsdale* ruled that the regulation's "categorical" penalty, which in that case would have required the employer to provide an additional 12 weeks of FMLA-protected leave after the 30 weeks of leave the employee had already received, was inconsistent with the statutory entitlement to only 12 weeks of FMLA leave and contrary to the statute's remedial requirement that an employee demonstrate individual harm. Several other courts have also invalidated similar categorical penalty provisions of the current regulations. The proposed rule therefore removes these categorical penalty provisions and clarifies that where an employee suffers individualized harm because the employer failed to follow the notification rules, the employer may be liable.

**Serious Medical Condition:** The modifications retain the six individual definitions of serious health condition while adding guidance on two regulatory terms.

One of the definitions of serious health condition involves more than three consecutive calendar days of incapacity plus “two visits to a health care provider.” Because the current rule is open-ended, the Tenth Circuit has held that the “two visits to a health care provider” must occur within the more-than-three-days period of incapacity. The DOL proposes that the two visits must occur within 30 days of the period of incapacity. Second, the proposed rule defines “periodic visits” for chronic serious health conditions as at least two visits to a health care provider per year.

**Employer Notice Obligations:** The proposed rule consolidates all the employer notice requirements into a “one-stop” section of the regulations. The proposal imposes increased notice requirements on employers in order to better enable employees to know and understand their FMLA rights. The proposal also seeks to improve communication by extending the time for employers to send out eligibility and designation notices from two business days to five business days. In addition, the proposal specifies that if an employer deems a medical certification to be incomplete or insufficient, the employer must return it to the employee, specify in writing what information is lacking, and then give the employee seven calendar days to cure the deficiency.

**Employee Notice:** The proposal modifies the current provision that has been interpreted by some courts to allow employees to provide notice to an employer of the need for FMLA leave up to two full business days after an absence, even if they could provide notice more quickly. Lack of advance notice (e.g., before the employee’s shift starts) for unscheduled absences is one of the biggest disruptions employers point to as an unintended consequence of the current regulations. The proposal provides that in most cases an employee needing FMLA leave must follow the employer’s usual and customary call-in procedures for reporting an absence absent unusual circumstances. The proposal also highlights (without changing) the existing consequences an employee faces if he/she does not provide proper notice of his or her need for FMLA leave.

**Medical Certification:** The DOL also proposed many changes to medical certifications, including:

- Language that would clarify exactly when certification is incomplete.
- A notice requirement when an employer determines a certification is incomplete, requiring

the employer to state in writing what additional information is necessary and to provide the employee with seven calendar days to cure the deficiency.

- A requirement that an employer notify an employee if the certification has not been returned in the 15-day time period and give the employee another seven calendar days to provide the certification unless that is not practicable.
- A revised WH-380 medical certification form.

Under the current regulations, employers have had difficulty investigating suspected fraud related to medical certifications because of the requirement that an employer obtain the employee’s permission prior to seeking authentication of the certification from the employee’s health care provider. In order to deal with this issue, the DOL has recommended that employers be allowed to contact the employees’ health care providers directly to authenticate and clarify medical certifications. However, the DOL noted that such contact would be allowed only after an employee has been given the opportunity to cure any certification deficiencies.

**Family Military Leave:** As discussed above, new legislation has recently been signed into law expanding the FMLA to include protections to some family members and caregivers of U.S. soldiers. The DOL is seeking comment on many questions arising from this recent expansion of the FMLA.

**The Comment Period:** The DOL is accepting comments on the above proposed changes. The comment period typically runs between 60 to 90 days after publication in the *Federal Register*. The DOL will then review the comments for another 60 to 90 days before issuing any final regulations. As a result, it most likely will be several months, if not late 2008, before the DOL issues any final regulation changes.

## CONCLUSION

Employers should be reviewing their FMLA policies to ensure they comply with the new legislation – especially the new provision regarding leave eligibility for caregivers of wounded service members, as this provision is effective immediately. Employers should also periodically check the DOL’s website throughout 2008 to determine when the remaining provision of the new legislation becomes effective and the DOL’s proposed regulations have been finalized.

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Please let us know if you have any comments or suggestions for the Employer Update, a monthly publication of Hall Farley, Oberrecht & Blanton, P.A. If you would like to be added to or removed from our mailing list, or would like to receive our monthly newsletter via e-mail, please contact me at [krt@hallfarley.com](mailto:krt@hallfarley.com), or P.O. Box 1271, Boise, ID 83701. Thank you.

Don't miss our next . . .

***Bagels & Briefs***  
Thursday, February 28, 2008  
7:30 a.m. — 9:00 a.m.

At a new location:



Boise West - Meridian

**Courtyard by Marriott**  
1789 S. Eagle Rd.  
Meridian, ID 83642  
(just south of Overland, on Eagle Rd.)



Topic: ***Chicken Soup for the HR Professional***

Description: We will discuss the latest information on a variety of hot topics, including religious discrimination, wage and hour issues, and employment application forms.

**Please RSVP** if you or others from your company plan to attend by calling Katie Touchstone at 395-8500, faxing to 395-8585, or sending an e-mail to [krt@hallfarley.com](mailto:krt@hallfarley.com). There is no charge for the seminar — it's our way of keeping our clients and friends informed about important employment law issues.