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Better Late Than Never: The DOL's Proposed Regulatory Changes to the FMLA

*By George C. Hlavac and
Edward J. Easterly*

On February 11, 2008, the Department of Labor ("DOL") issued the first major proposed revisions to the Family and Medical Leave Act ("FMLA") since its inception. The FMLA was enacted in 1993 and provides eligible employees of covered employers (50 or more employees within a 75 mile radius) unpaid leave for certain qualified reasons (*e.g.*, the birth of a child, the serious medical condition of the employee or an immediate family member of the employee, and military caregiver responsibilities).

This article will summarize the most significant of the **proposed** changes to the regulations. It should be noted that these are merely proposed changes. The final regulatory changes

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LEGAL UPDATE

Insights and Developments in the Law

Spring 2008

TH&S Attorneys Convince Court to Limit ERISA Plan Participation

By Oldrich Foucek III and Wendy R.S. O'Connor

Employers who establish incentive plans for certain classes of high-level employees may find themselves the subject of claims by non-qualifying employees seeking to share in plan benefits despite having never been included in the class of employees for whom the plan was created. A recent decision from the Superior Court of Pennsylvania, however, reaffirms a company's ability to set up this type of benefit plan and to successfully limit eligibility to a select group of employees. In *Evans v. Sodexo*, the Superior Court of Pennsylvania affirmed the validity of a "top hat" program created to provide incentives to high-level employees, and in so doing, issued one of the few opinions by a Pennsylvania appellate state court interpreting the provisions of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 et seq.

The Plan in question was created for the exclusive benefit of an executive management team ("EMT"), a limited group of senior executives of which, by his own admission, Plaintiff was not a designated member. However, the Plan also contemplated "such other classes of key management employees as determined in writing annually by the Administrator." Although the Administrator *could* expand participation in the Plan beyond the EMT, it never explicitly did so. The Plaintiff filed his action six years after first

learning of the Plan's existence and five years after first learning that he was not being considered a participant in the Plan.

On appeal from the trial court's award of summary judgment in favor of the Employer/Plan, the Superior Court was asked to determine whether the claims brought by a former employee seeking to recover deferred compensation benefits were time-barred, and if not, whether he was entitled to participate in Plan benefits. Applying a four-year statute of limitations¹, the Superior Court found that Plaintiff's claim accrued when he discovered the injury that formed the basis for his claim and concluded that Plaintiff's cause of action occurred more than four years before he filed suit. In reaching this decision, the Superior Court identified the following undisputed facts:

- Plaintiff never actually made a formal claim for benefits under the Plan because he was "not that bold to address it;"
- Plaintiff was aware more than six years before he filed suit that the Plan existed and that he was not included; and
- Plaintiff knew or should have known that he was not a Plan participant at least five years before he filed suit.

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Announcements

Shareholder **Barbara L. Hollenbach** has been named a 2008 Woman of the Year by the Bethlehem area YWCA. The Woman of the Year Award is given to Bethlehem area women who donate their time and services to the community, either as a volunteer, community activist, fundraiser, leader of a special project or event, or advocate on behalf of others. Hollenbach earned the award through her work and leadership with Quota International of Bethlehem, Cops n' Kids Children's Literacy Program, Northampton County Homemaker and Health Aide Service, YWCA of Bethlehem, Family & Counseling Services of the Lehigh Valley, and Girls, Inc., of Bethlehem.

Most recently, Barbara was recognized as an Athena honoree by the Executive Women's Council of the Greater Lehigh Valley Chamber of Commerce. Barbara also served as one of the presenters of the Pennsylvania Bar Institute's flagship course on workers' compensation in Philadelphia on April 2, 2008, Camp Hill on April 8, 2008, and Pittsburgh on April 30, 2008 and will be a presenter at the Pennsylvania Bar Association's annual meeting on Recent Developments in Workers' Compensation on June 5, 2008. Named one of the Pennsylvania Super Lawyers for 2006 by Philadelphia Magazine, Barbara also co-authored and co-presented the PBI Workers' Compensation Practice & Procedures manual and course in 2006, 2004, 2002 and 2000.

Shareholder **Scott B. Allinson** has been appointed to the Greater Lehigh Valley Chamber of Commerce Foundation board and also serves as its solicitor. The mission of the Foundation is to create a vibrant downtown community by serving as a valley-wide advocate and partner for business development and success in our downtowns. As such, it will secure and distribute the resources necessary to support downtown initiatives that create economic vitality, strengthen regional

cooperation, and enhance the quality of life in the Lehigh Valley.

Wendy R.S. O'Connor has been elected to the Christkindlmarkt Council of ArtsQuest for a three-year term. Christkindlmarkt is recognized by Travel and Leisure Magazine as one of the top holiday markets in the world, and features aisles of exquisite handmade works by the nation's finest artisans, the heart-warming sounds of live holiday music, authentic German and Austrian food and much more. The market, which is visited by 65,000 people annually, also includes fun children's rides, entertaining ice carving

demonstrations and is world-renowned for its quality, hand-crafted Christmas ornaments and collectibles.

Stephanie A. Kobal recently joined the Board of Directors for the Executive Service Corps of the Lehigh Valley (ESCLV). It's mission is to assist nonprofit institutions in the Lehigh Valley become more successful through the use of volunteer management consultants. ESCLV currently offers experienced and professional consulting in the areas of strategic planning, board governance/development, financial management/fundraising, and market planning.

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Thus, the Court concluded, because Plaintiff's action was filed after the applicable statute of limitations expired, his case was time-barred.

Although the Superior Court was not required to consider the remainder of Plaintiff's arguments on appeal, it chose to do so, ultimately rejecting Plaintiff's argument that he was a "key management employee" and therefore entitled to participate in the Plan simply because he considered himself—and may have been—a "key employee" as that term is used in the everyday sense. The Superior Court also rejected Plaintiff's argument that he was a member of the EMT—de facto or otherwise—given the fact that the EMT was clearly defined and its members known throughout the company.

The thoroughness of the Court's consideration of this matter was somewhat surprising, given that the Court had several opportunities to resolve this case without reaching the merits asserted by the Plaintiff. Indeed, the

Court could have disposed of this case by (1) dismissing the appeal due to Plaintiff's failure to follow the Court's operating procedures; (2) determining that Plaintiff had no standing to bring this matter in the first place; or (3) rendering its decision based solely upon the statute of limitations argument. Instead, the Court considered the actual merits of Plaintiff's claim that he was entitled to participate in the Plan, thus suggesting an interest by the Court to articulate a position on this ERISA action.

The holding in *Evans v. Sodexo* stands for the proposition that employers who choose to provide "top hat" employee benefit plans for high-level employees and seek to limit participation therein are on solid ground. Employers who are nonetheless confronted with challenges to "top hat" plans should benefit from the protection afforded by *Evans v. Sodexo*, confident that guidelines in place to limit participation in those plans will be upheld by the courts.

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FMLA

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are expected to be published later this year.

Joint Employer

The first proposal dealt with the definition of “joint employer”. The FMLA currently provides that employees who are employed by two employers must be counted by both employers in determining coverage and eligibility. The proposed regulations seek to clarify when the Act applies to a “Professional Employer Organization” (“PEO”), *i.e.*, an employee placement organization. The proposal seeks to amend the FMLA to clarify that a joint employment relationship does not arise if a PEO performs merely administrative functions (*i.e.*, payroll, benefits, updating employment policies, etc.) If the PEO has the authority to hire, fire, or direct and control the employees, however, the PEO is then considered a joint employer under the FMLA and must, therefore, satisfy its requirements under the FMLA.

What Is an Eligible Employee?

The proposed revisions also deal specifically with the issue of breaks in service. Currently, the FMLA states that any individual who was employed for at least 12 months and has been employed for at least 1,250 hours of service during those 12 months preceding the leave is eligible for FMLA leave. The 12 months need not be consecutive, and there is no temporal limit on when the prior employment occurred. Under the proposed regulations, while the 12 months still need not be consecutive, employment prior to a continuous break in service of five (5) years or more need not be counted. As an example, if an employee worked for five months in 2008 and worked for

the same employer for two full years in 1997-98, the employer need not count the prior employment in determining FMLA eligibility. As a result, any break in service of five or more years essentially resets the FMLA clock.

Categorical Penalties (Ragsdale Decision)

Prior to the proposed revisions, the Supreme Court in *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002) determined that the categorical penalty, which provided employees with additional leave if they were not provided notice of their rights under the FMLA, was invalid. In its proposed regulations, the DOL has eliminated this type of categorical penalty.

Defining “Worksite”

The term “worksite” is not specifically defined under the current regulations. Under the proposed regulations, a worksite, for an individual who is jointly employed at a fixed worksite for a period of one year or more, is the actual physical place where the employee works.

Serious Health Condition

While the proposed regulations did not change the definition of a “serious health condition,” they do, however, provide clarification as to what constitutes “continuing treatment” and a “chronic condition.” The proposed regulations establish that an employee can meet the definition of continuing treatment if the employee has one visit to a health care provider and a regimen of continuing treatment, or two visits to a health care provider combined with at least three consecutive days of incapacity. Notably, the DOL has closed the door on open-ended leave. This is due to the fact that the two doctor visits must occur within thirty (30) days of the beginning of the pe-

riod of incapacity.

The proposed regulations seek to modify the definition of a “chronic serious health condition.” The current regulation defines a chronic condition as one which requires periodic visits for treatment, without defining the term “periodic”. The proposed regulations will define the term “periodic” as twice or more a year.

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Endnote

¹ Because ERISA does not contain a specific statute of limitations for actions brought to collect benefits pursuant to §502(a)(1)(B), a trial court is required to “borrow” the time limitation under Pennsylvania law most analogous to case at hand. The trial court concluded that the three-year limitations period referenced in the Wage Payment and Collection Law (“WPCL”) was most analogous to Plaintiff’s ERISA claim. The Superior Court’s pronouncement favoring the four-year limitations period applicable to breach of contract actions appears to be the first statement of a Pennsylvania appellate court on that subject.

Oldrich Foucek, III, Esquire and Wendy R.S. O’Connor, Esquire prepared the Brief for Appellee submitted to the Superior Court of Pennsylvania. Ronnie Hess, Esquire, participated in the preparation of the Motion for Summary Judgment which was granted by the trial court and from which this appeal was taken.

Actual resolution of legal issues depend upon many factors, including variations of facts and state laws. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this newsletter.

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Amount of Leave

The current FMLA does not provide any information regarding the impact of holidays on FMLA leave. Under the proposed regulations, “holidays” are separated into two categories. If an employee needs less than a full week of leave, and the holiday falls within that partial week, the hours of missed time do not count as FMLA leave if the employee would not otherwise have been required to report to work. On the other hand, if the employee takes a full week of leave in a week containing a holiday, the holiday hours count toward an employee’s FMLA leave.

Substitution of Paid Leave

The proposed regulations specifically address the issue of substituting paid leave (*i.e.*, sick leave, vacation time, personal leave) for FMLA leave. In this regard, the proposed regulations seek to clarify the definition of “substitute”. Unlike the general definition, under the FMLA, the term “substitute” means that the FMLA leave and the paid leave run concurrently.

In addition, the DOL also recognized that when taking paid leave, an employee must abide by the terms of the employer’s policies. As a result, if an employer requires two days notice for vacation, the employee must meet that requirement in order to substitute the paid vacation time for the unpaid leave.

Notice Requirements

The DOL proposed some substantive changes for both employer and employee notice requirements. Some of the proposed changes include the fact that an employer will have five (5) days to designate the leave as FMLA, compared to the current two (2) day period. An employer may also designate the leave as FMLA retroactively once it receives enough information. In addition, the proposals recommend

that an employee must provide his/her employer with notice of at least thirty (30) days in advance when the leave is foreseeable. The employee must also provide his/her employer with enough information to put the employer on notice that the leave may fall within the FMLA.

Medical Certification

The DOL has proposed several changes to the regulations dealing with medical certifications. The changes include, but are not limited to, the requirement that if an employer deems a certification insufficient, it must state in writing the defect and provide the employee seven (7) days to cure. If the employee fails to cure the defect, the employer may deny the leave. Also of note is the fact that an employer must no longer utilize the employer’s health care provider in order to contact an employee’s physician directly to authenticate or clarify a certification, provided that the employer complies with the Health Insurance Portability and Accountability Act (HIPPA) and the contact occurs after an employee is provided an opportunity to cure the defect.

Additionally, the DOL has proposed regulations with respect to the “fitness-for-duty” certification. Under the proposed regulations, an employer may provide an employee with a list of job requirements/duties with an eligibility notice when the employer advises the employee of the necessity for a fitness-for-duty certification. The employer may require the health care provider to certify that an employee can perform the list of duties provided in the certification. Further, an employer is permitted to require an employee to furnish a fitness-for-duty certification every 30 days if an employee has used intermittent leave during that period of time.

If you have any questions regarding the proposed regulatory changes to the FMLA or any employment or labor related issues, please contact one of our labor and employment attorneys.

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