Influencing the FMLA

Rulemaking: Modifications to the Definition of a “Serious Health Condition”

Rulemaking background

Legislation is only the first step in creating a new program or modifying an existing one. Once legislation passes, government agencies begin the rulemaking process in which mandates are translated into concrete practices. Every year, agencies are required to publish a regulatory plan and agenda to notify the public of any future rulemaking. The regulatory plans and agendas are publicly available online via regulations.gov and on U.S. department websites (see for example the U.S. Department of Labor’s Unified Agendas).

Agencies often do background research and collect information before issuing a proposed rule. They must then publish a “Notice of Proposed Rulemaking” in the Federal Register as a formal call for public input on the rule. Any individual or group may respond to the Notice by submitting suggestions or concerns pertaining to proposed rule. Usually this comment period lasts 30 to 60 days, although it may vary. Other avenues to influence the proposed rule include public hearings or public meetings, although these are not required.

Once the public has submitted comments and suggestions, the agency will decide whether to incorporate or disregard the recommendations. If major changes are made to the rule, the agency may publish a supplemental proposed rule for public review. If the changes are minor, the agency may publish a final rule to be put into effect. In the final rule, the agency must respond to major criticisms in the proposed rule comments, explain the agency’s decision and why it did not choose other alternatives.

Rulemaking with the FMLA

FMLA rulemaking follows the general process outlined above. In 2008, the definition of a “serious health condition” was adjusted through the rulemaking process and demonstrates a case in which employers and organizations representing workers influenced the final regulation.

The original 1993 FMLA legislation defined “serious health condition” as:

“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.”

Ensuring regulation specified that employees could meet the definition of having a “serious health condition” if they had at least two visits to a health care provider in connection with a period of incapacity of more than three consecutive calendar days. The regulations flexibly bounded the definition by providing examples of conditions not normally be expected to be covered: “Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, […etc.], are examples of conditions that do not meet the definition of a serious health condition.”
Many employers were concerned that the regulations provided an overly broad definition of a “serious health condition.” As a result, during the rulemaking process, the DOL received comments from both employer and employee groups and made slight modifications to the definition. The DOL clarified that in order to for a ‘serious health condition’ to qualify for FMLA leave, an employee must be incapacitated for more than three full, consecutive calendar days, must visit a health care provider twice within 30 days of the beginning of the incapacity (unless “extenuating circumstances exist”), and must have their first visit take place within seven days of the first day of incapacity. The DOL made no changes to the language providing examples of illnesses that should not qualify for FMLA leave. Each of these changes are discussed below:

Days of incapacity

Many employers argued that the requirement that an employee must be incapacitated for more than three consecutive calendar days placed onerous administrative burdens on employers and allowed for minor ailments to qualify for FMLA protected leave. These employers suggested that the DOL should require employees to be incapacitated for five consecutive work days or seven consecutive calendar days to qualify for FMLA leave. Employee groups, on the other hand, strongly advocated that the requirement be maintained at more than three days, arguing that serious conditions requiring leave can sometimes be of short duration, such as acute appendicitis.

After considering these concerns, the DOL’s final rule maintained the three day requirement, stating that the severity of illness was better measured by calendar days of incapacity, rather than days absent from work, especially for employees with nonstandard schedules. However, to clarify that this test of severity cannot be measured by partial days, the DOL added that the employee must be incapacitated for more than three full, consecutive calendar days in order to be eligible for FMLA leave.

Time period for required visits

Prior regulation provided no guidance on when the two visits to a health care provider in connection with a period of incapacity must occur. The DOL proposed that the visits must occur within 30 days of the incapacity. Employers had mixed reactions to this proposed change. Some appreciated the clarification the change would bring to a “vague area” in the rules, while others argued that the two visits should occur during the three-day period of incapacity. Some employers were concerned that employees could abuse the two visit requirement by simply scheduling a second doctor’s appointment. On the other hand, some employee groups opposed the change, stating that some conditions do not require follow-up appointments within 30 days and it can be difficult to schedule appointments with a specialist within 30 days. These groups suggested that the two visits should occur during a period of three to six months.

After considering these concerns, the DOL’s final rule maintained the 30 day requirement. The DOL justified its decision, stating that a 30 day period is “consistent with usual treatment plans, and guards against employers making quick judgments that deny FMLA leave when employees otherwise should qualify for the law’s protections.” However, to alleviate business concerns that employees may abuse the two visits requirement, the DOL added the additional requirements that the first visit happen within seven days of the first day of incapacity, and that the need for a second visit within 30 days be determined by a
health care provider, not the employee or patient. Lastly, to alleviate employee group concerns that some employees with valid serious health conditions may not be able to schedule two visits within 30 days, the rule includes an “extenuating circumstances” exception to the 30 day requirement so as to avoid negatively impacting health vulnerable employees.  

Conditions not covered under the FMLA

There was substantial debate around the language providing examples of conditions not normally qualifying for FMLA leave. Many employers expressed concerns that as defined, “serious health condition” would allow employees to claim FMLA leave in many cases where a health condition was not actually serious. The U.S. Chamber of Commerce requested that minor ailments be categorically excluded, without exceptions based on complications. On the other hand, groups representing employees argued that the law was appropriate as written and were concerned that narrowing the definition, as proposed by employer groups, would exclude or overly burden health-vulnerable employees.

After reviewing these concerns, the Department of Labor’s (DOL) final rule in November 2008 made no changes to the examples of what would usually not constitute a “serious health condition.” The DOL stated that after careful consideration, it had found no regulatory alternative that would alleviate the business community’s concerns around the abuse of minor ailments without excluding employee absences that should be FMLA-protected.

The responses of the DOL demonstrate the agency’s efforts to balance valid business and employee concerns while still protecting health-vulnerable workers. The FMLA’s stated goals include providing reasonable, job protected medical and family leave to employees, in a manner that accommodates the legitimate interests of employers. The debate of the definition of a “serious health condition” highlights the competing demands that can make it difficult to meet both these goals. Ultimately, the DOL made modifications to the definition that promoted more equitable access to FMLA leave. By choosing to not categorically exclude what some perceived as ‘minor illnesses’, maintain the definition of incapacity at three days, and require two visits within 30 days, the DOL tried to protect workers’ access to medical leave. At the same time, the DOL incorporated measures, such as the requirement that the first doctor’s visit happen within seven days, to alleviate business concerns over FMLA abuse and administrative burden. Thus this rulemaking process demonstrates the competing demands affecting the FMLA, the DOL’s attention to access and job-protection for health-vulnerable workers, and the ability of stakeholders to influence the implementation of the FMLA.

The Final Rule became effective on January 16, 2009.

Sources & notes