Comparison of Current and FINAL DOL FMLA Rules

Current	Proposed	Impact
825.110 - In determining eligibility with an employer there was no limit to how far back a person could go when considering prior employment to meet the 1 year test.	Under the proposed rule a person can only go back 7 years if there was a break in service with that employer.	This could cause an employee to lose credit for prior employment outside that new 7 year window.
825.114 – A condition can qualify as a "serious health condition" after an employee has an absence of more than three days if it is followed by two visits to a healthcare provider or one visit and one form of treatment.	825.115.a Under the proposed rule the visits or treatments must occur within 30 days of the start of the absence.	The proposed rule would create a window within which an employee must receive treatment. The prior language provided an open-ended period, which was better for the employee because some ailments do not manifest themselves quickly.
825.114.b – Currently the regulations state that part of the criteria for determining a serious health condition is an absence of "more than 3 days"	825.115(a) – Now reads that the time of incapacitation must be 3 FULL days.	This means if a person gets ill while at work that first day will not count toward the criteria in determining a serious health condition.
825.114 – When determining a "serious health condition" a person is required to see a doctor or receive treatment following the onset of the absence.	825.115(a) – It is now proposed that the first visit and/or treatment must occur with 7 days of the start of the absence.	This will now force workers to get treatment when it is not necessary. Oftentimes in long term chronic conditions employees can control their condition with having to see their health care provider. In addition the symptoms of the condition may not require treatment right away but may in fact call for treatment after the 7 day period has lapsed.

825.114 – An individual who has a life-long or long-term qualifying condition can be required to provide certification once a year or for the term determined by the healthcare provider, whichever is less.	825.115(c) – Will now require certifications twice a year.	This will require the employee to make costly, repeated, and unnecessary trips to a healthcare provider to document a condition that is not expected to change.
825.120(a)(c) – Current regulations allow the father of a child to care for the pregnant mother	825.120(a)(c)- It has been proposed to change the word “father” to “husband”	This now means that the father of a child cannot use FMLA to care for the pregnant mother unless they are married.
825.203 – When employees are absent they can be charged FMLA for hours they miss in their normal work week. Overtime hours are not included in that designation	Under the proposed rule employees can be charged FMLA for overtime hours they were required to work but missed due to their FMLA condition.	This would cause employees to use their FMLA protection at a rate quicker than originally intended in the act and also allow employers to charge more than 40 hours a week against their FMLA annual entitlement
825.207 – Currently, when substituting paid leave for unpaid leave, employees are required to follow the law or the employer’s leave policies, whichever is less stringent.	Under the proposed rule the employee must follow the employer’s leave rules.	This will encourage employers to enact more stringent leave policies, as they cannot be forced to honor less stringent requirements in the law.

825.300 – Currently, if an employee submits a completed FMLA certification to his or her employer and the employer seeks a clarification of the certificate, the absence is provisionally covered by FMLA. In addition, if the employer needs clarification of a completed form, the employer has the option of seeking a second opinion at the employer's expense.	Under the proposal, employers can delay designating the absence as protected until they are satisfied with the information contained in the certification, simply by stating they believe the information is "vague or ambiguous."	This proposal grants extensive power to line supervisors. They can force employees to return to their healthcare providers, delay FMLA approval, and use these tactics to coerce employees and their healthcare providers to disclose private medical information. The cost of repeated trips to the doctor would be borne by the employee.
825.306 – Under current regulations, there is no place on FMLA forms for healthcare providers to report their diagnosis or prognosis when certifying employees for Family Medical leave; they must supply only the "medical facts" that justify the absence.	New regulations would permit (but not require) healthcare providers to offer a diagnosis and/or prognosis.	Experts suggest this change may violate medical privacy laws. As a practical matter, it may encourage employers to ask about an employee's diagnosis and prognosis.
825.307 – Currently an employer cannot contact employees' healthcare providers without their knowledge and consent.	Proposed changes would allow employers to make contact unilaterally if they suspect fraud or misrepresentation.	This will allow aggressive supervisors to make contact with healthcare providers without the knowledge of employees, thus compromising their right of privacy.

825.307 – Current rules stipulate that only employer healthcare professionals may discuss medical matters with an employee’s healthcare provider.	The proposed change would allow employers to designate a representative (other than the direct supervisor) for the purpose of making such inquiries.	This will allow non-medical personnel to discuss a worker’s medical concerns with the worker’s healthcare professional.
825.300- Once a supervisor has knowledge that an employee’s absence *may* be related to FMLA, he or she has two business days to provide information to the employee about the employee’s FMLA rights.	The proposed rule would expand the time frame to five business days	Employees already have difficulty getting timely notice of their rights from their employer. Giving employers more time seems unnecessary.
825.307 – Current rules require employers to give copies of second- and third-party evaluations to employees within two business days.	Proposed changes would expand this period to five business days.	Employers have often failed to give timely notices under the current rule. Expanding the timeframe makes no sense.
825.310 – Current rules stipulate that in some instances employees may return to duty from an FMLA absence with a simple statement from their doctor indicating they can return. Evaluations regarding fitness-for-duty exams, if necessary, were given after their return to duty and were the responsibility of the employer.	Proposed changes would allow employers to present healthcare providers with a list of duties and physical requirements of an employee’s job. The employer can require the healthcare provider to consider these requirements and submit statements as to whether or not the employee can perform them before they return to work.	This will create longer delays in when employees attempt to return to work. This will result in additional expenses to the employees and force them to use more of their FMLA protection during the delay. It is also intended to allow employers to offer light duty as a consideration.