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Via E-Mail

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February 4, 2008

Mr. Richard M. Brennan
Senior Regulatory Officer
Wage and Hour Division
Employment Standards Administration
U.S. Department of Labor
Room S-3502
200 Constitution Avenue, N.W.
Washington, DC 20210

Re: Family and Medical Leave Act proposed rules

Dear Mr. Brennan,

I represent management in employment matters. I wish to raise two issues that should be clarified in the revision of the FMLA regulations. Each of these issues has been the subject of a Court of Appeals decision interpreting an unclear provision of the FMLA regulations. Each of these issues need clarification in the new FMLA regulation so that there is, to the extent possible, clear and bright lines for employers so they can effectively manage their FMLA obligations without being surprised by vague or imprecise obligations. (Please do not interpret the fact that my comments are limited to these two issues to mean that I am not concerned with the larger issues such as intermittent leave. But, I believe you will hear from many in the employer community on this and so will not add on to their concerns.) The two issues I would like you to address are as follows.

First, the part of the definition of "serious health condition" that deals with two treatments, or one treatment followed by a regimen of continuing treatment, should be amended to make clear that these treatments must be during the incapacity, consistent with the holding in *Jones v. Denver Pub. Schools*, 427 F.3d 1315 (10th Cir. 2005). Employers would welcome this clarification to make it easier to determine whether an employee seeking leave under 29 C.F.R. § 825.114(a)(2) has a serious health condition.

Second, the application of "successor in interest" in 29 C.F.R. § 825.107 needs to be overhauled. As written, the potential application goes well beyond the use of this concept under Title VII of the Civil Rights Act. The concept of successor liability under Title VII has its origin in *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973), a case under the National Labor Relations Act in which a new owner of a business was required to remedy the unfair labor practices of the predecessor employer, where the new owner was aware of the unfair labor practices at the time of the acquisition. This obligation was not unfair to the new owner, since it could take into consideration the unfair labor practices in negotiating its purchase price. There is some case law following this concept in Title VII cases. *See, e.g., Wheeler v. Snyder Buick, Inc.*, 794 F.2d 1228 (7th Cir. 1986). I raise no quarrel with the FMLA borrowing the successorship concept in *Golden State Bottling*, since it applied to cases involving a remedy for the predecessor's wrongdoing by a successor that was aware of the wrongdoing. Thus, if an employer unlawfully discriminated against an employee for taking FMLA leave, and then sold to another company before remedying the discrimination, the new company with knowledge of the FMLA violation could be a successor in interest for purpose of remedying the predecessor's wrongdoing.

The preamble to the current FMLA regulation suggests that the successor's obligation could arise even when there is no wrongdoing by the predecessor, such as where an employee of the predecessor is on FMLA-covered leave at the time of the transfer to the new owner. I believe this stretches the Title VII "successorship in interest" concept beyond its roots. Even worse, a recent case uses "successorship in interest" to eviscerate the FMLA rules for employee eligibility. In *Cobb v. Contract Transp., Inc*, 452 F.3d 543 (6th Cir. 2006), the successor in interest regulation in 29 C.F.R. § 825. 107 was stretched to require a company that outbid a competitor for certain trucking routes to treat a newly hired employee as FMLA-eligible immediately. This is not only inconsistent with the successorship concept in *Golden State Bottling*, but also it creates great uncertainty by innocent new owners of businesses as to when an employee is eligible for FMLA leave. This regulation needs to be revised to provide employers with more certainty on this, to avoid it being a trap for the unwary. This is especially so because the eight factors used to determine a successor in interest in 29 C.F.R. § 825. 107 is not itself a bright line, but a list of discrete criteria that must be "viewed in their totality" (*see* 29 C.F.R. § 825. 107(b)).

Businesses deserve clear rules so they can conduct their affairs effectively, fairly and profitably within the law. Thank you for your consideration.

Sincerely,

MILLER JOHNSON

Brent D. Rector

By
Brent D. Rector