2007

Light Duty

Workplace Flexibility 2010, Georgetown University Law Center

LIGHT DUTY
DOL Topic: G[1]

PART ONE OF THIS MEMORANDUM PROVIDES A SUMMARY OF QUESTIONS ASKED AND COMMENTS SUBMITTED IN RESPONSE TO THE DOL REQUEST FOR INFORMATION ("RFI") ABOUT "LIGHT DUTY" WORK.[2]

PART TWO OF THIS MEMORANDUM CONTAINS THE RELEVANT STATUTORY AND REGULATORY TEXT. PART TWO ALSO LISTS OTHER SOURCES CITED IN THE COMMENTS ABOUT THIS TOPIC.

PART ONE

The DOL requested information about whether "light duty" work should count toward an employee's 12 weeks of FMLA leave. While the statute contains a general prohibition against employers' interference with employees' exercise of their rights under the FMLA, it is silent on the specific issue of whether "light duty" work may be counted toward employees' 12-week allotment of FMLA leave.[3]

The current regulations interpret the statutory provision against interference with employee rights to prohibit an employer from requiring employees to accept "light duty" work in lieu of full-time FMLA leave.[4] The regulations explicitly permit an employee to elect a "light duty" assignment in lieu of such leave, but such an election must be voluntary and uncoerced.[5]

If an employee elects light duty in lieu of FMLA leave, such time may be counted toward an employee's 12 weeks of leave for job restoration purposes. As the regulations state: "the employee's right to restoration to the same or an equivalent position is available until 12 weeks have passed within the 12-month period, including all FMLA leave taken and the period of 'light duty.'"[6] A DOL Opinion Letter explains that

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[1] This topic is discussed in the Family and Medical Leave Act Regulations: A Report on the Department of Labor's Request For Information, 72 Fed. Reg. 35550 (June 28, 2007), *available at* http://www.dol.gov/esa/whd/FMLA2007FederalRegisterNotice/07-3102.pdf, primarily in Chapter VII.

[2] The comments reviewed herein are from employers, employer organizations, employees, employee organizations, health care providers, and health care provider organizations. They reflect all comments posted on regulations.gov or available via a Google search as of May 8, 2007. More detailed descriptions of these comments are found in the "Digest of Comments Submitted in Response to the Department of Labor's Request for Information on the Family and Medical Leave Act," *available at* http://www.law.georgetown.edu/workplaceflexibility2010/law/fmla.cfm.

[3] 29 U.S.C. § 2615(a)(1).

[4] 29 C.F.R. §825.220(d).

[5] *Id.*

[6] *Id.*

if an employee elects light duty in lieu of FMLA leave, none of the time an employee spends on light duty may be counted against the employee's 12-week FMLA allotment.[7]

With respect to "light duty," the DOL asked for comments about:

- "Light Duty" Work and Employees' FMLA Leave

ISSUE: "Light Duty" Work and Employees' FMLA Leave

- **The RFI asked: Should "light duty work" be calculated in the same manner as other periods of FMLA leave?** In other words, should an employee's voluntary and uncoerced acceptance of "light duty" employment, as permitted under 29 C.F.R. § 825.220(d), also count against an employee's 12-weeks of FMLA allotted time? The RFI stated that two cases had interpreted this regulation to mean that an employee uses his or her 12-week FMLA allotment while on light duty:

  - *Artis v. Palos Community Hosp.*, No. 02 C 8855, 2004 WL 2125414 (N.D. Ill. Sept. 22, 2004). The court held that, pursuant to § 825.220(d), "the FMLA is satisfied [with] 'voluntary and uncoerced' [light duty work if] the employee's regular job is held open for twelve weeks, regardless of whether she spends those twelve weeks on light duty, unpaid leave, or some combination." The employee was not entitled to job restoration or lost pay when her employer declined to restore her to her previous position after she accepted a "light duty" position for more than 12 weeks.

  - *Roberts v. Owens-Illinois, Inc.*, No. 2:02-CV-207-LJM-WGH, 2004 WL 1087355 (S.D. Ind. May 14, 2004). The court first read the DOL regulation as stating that "an uncoerced period of 'light duty' counts as FMLA leave." The court then concluded that even if a period of "light duty" does not count as FMLA leave, there was no violation of the FMLA in the case before it in which an employee had been terminated following 12 weeks of voluntary "light duty" work, when the employee was not physically able to return to her previous position at that point in time. The employee's union subsequently secured her reinstatement to her previous position with back pay.

[7] Dep't of Labor Opinion Letter, FMLA-55 (Mar. 10, 1995), http://www.dol.gov/esa/whd/opinion/FMLA/prior2002/FMLA-55.pdf.

EMPLOYER-SIDE COMMENTS

A number of individual employers and employer-side groups address this topic. Each bullet point below encapsulates a particular type of comment from employers or employer organizations, and is followed by explanatory text describing the comment in more detail.

- Employers express the view that they should be able to *require* employees to accept light duty positions that are consistent with their medical restrictions. Some employers state that employees who are able to do a light duty job should be prohibited from taking FMLA leave.

- In support of light duty assignments, the National Coalition to Protect Family Leave ("Coalition") states that many employees lack the financial resources to take unpaid FMLA leave, and that light duty employment allows employers to retain productive employees during periods of recovery from injury or illness.

- The Coalition expresses the view that because employees are not fully productive while on light duty assignment, time spent on light duty assignment should count toward employees' 12-week FMLA leave allotment. The Coalition and a number of other employers agreed with the DOL that two cases had held that time spent on "light duty" reduces an employee's total FMLA leave allotment. (The Coalition references the two cases cited in the RFI - *Artis v. Palos Community Hosp.* and *Roberts v. Owens-Illinois, described above* – while other commenters simply reference that there were "at least two cases [with such holdings . . .])."

- Employers' Suggested Changes: The Coalition suggests that the DOL should either revise 29 C.F.R. § 825.220(d) to: (1) allow employers to require light duty work when such work is consistent with employees' medical restrictions; or (2) specifically state that time spent on light duty may be counted against both 12 week *restoration* protection and 12 week leave *allotment*. Other employers suggest that the DOL should modify 29 C.F.R. § 825.115 to allow an employer to require an employee to accept a light duty assignment consistent with medical restrictions provided that the pay and benefits for the light duty position are the same as the pay and benefits for the employee's previous position.[8]

[8] *See also* Topic H.

EMPLOYEE-SIDE COMMENTS

Most employees and employee organizations did not address this topic. The bullets below encapsulate the few employee-side comments on this topic.

- Employee organizations state that there is no basis in the statute or regulations for treating a light duty assignment as FMLA leave.

- The National Partnership for Women and Families ("the Partnership") states that counting light duty work towards an employee's FMLA leave allotment contradicts the plain language and purpose of the FMLA. In addition, the Partnership notes that such an interpretation (although consistent with the unpublished cases that were cited in the RFI) contradicts the DOL's interpretation of its own regulations. Specifically, the Partnership cites a DOL Opinion Letter issued in March 1995 stating that "light" duty work should not count against FMLA leave allotments.

- The AFL-CIO states that permitting employers to require light duty work, or to count that work towards an employee's 12-week allotment, would violate the FMLA's prohibition against employers' interference with, restraint, or denial of the exercise of FMLA rights (29 U.S.C. § 2615(a)(1)). The AFL-CIO also states that such action would violate the current regulations under which employers may not "induce employees to waive their FMLA rights" (29 C.F.R. § 220(d)) or "change[] the essential functions of the job [to] preclude the taking of leave" (29 C.F.R. § 825.220(b)(2)).

- The Coalition of Labor Union Women ("CLUW") identifies the following as distinctly different purposes of light duty employment and the FMLA: the former is designed to allow employees to work while recovering from injury or illness, while the latter guarantees employees the right to leave during which to recover. Because any time spent working serves a different purpose than leave to address medical conditions, the CLUW states that it would violate the intent of the statute to allow light duty work to count towards an employee's 12-week FMLA allotment. Further, the CLUW states that many collective bargaining agreements include "light duty" job protections for workers with medical conditions and provisions ensuring that workers with disabling conditions return to some form of paid work as soon as medically possible.

PART TWO

THE APPLICABLE STATUTORY SECTIONS AND REGULATORY PROVISIONS RELATED TO TOPIC G HAVE BEEN EXCERPTED BELOW. THESE PROVISIONS WERE NOT NECESSARILY CITED IN THE RFI.

STATUTE

29 U.S.C. § 2615(a)

Interference with rights

(1) Exercise of rights - It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.

REGULATIONS

29 C.F.R. § 825.115

An employee is ``unable to perform the functions of the position' 'where the health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's position within the meaning of the Americans with Disabilities Act (ADA), 42 USC 12101 et seq., and the regulations at 29 CFR § 1630.2(n). An employee who must be absent from work to receive medical treatment for a serious health condition is considered to be unable to perform the essential functions of the position during the absence for treatment. An employer has the option, in requiring certification from a health care provider, to provide a statement of the essential functions of the employee's position for the health care provider to review. For purposes of FMLA, the essential functions of the employee's position are to be determined with reference to the position the employee held at the time notice is given or leave commenced, whichever is earlier.

29 C.F.R. § 825.220

(b) Any violations of the Act or of these regulations constitute interfering with, restraining, or denying the exercise of rights provided by the Act. ``Interfering with'' the exercise of an employee's rights would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave. It would also include manipulation by a covered employer to avoid responsibilities under FMLA, for example: . . .

(2) changing the essential functions of the job in order to preclude the taking of leave. . . .

(d) Employees cannot waive, nor may employers induce employees to waive, their rights under FMLA. . . . **This does not prevent an employee's voluntary and uncoerced acceptance (not as a condition of employment) of a "light duty" assignment while recovering from a serious health condition** (see § 825.702(d)). **In such a circumstance the employee's right to restoration to the same or an equivalent position is available until 12 weeks have passed within the 12-month period, including all FMLA leave taken and the period of "light duty."**

29 C.F.R. § 825.702(d)

(1) If FMLA entitles an employee to leave, an employer may not, in lieu of FMLA leave entitlement, require an employee to take a job with a reasonable accommodation. However, ADA may require that an employer offer an employee the opportunity to take such a position. An employer may not change the essential functions of the job in order to deny FMLA leave. See § 825.220(b).

(2) . . . At some point the health care provider providing medical care pursuant to the workers' compensation injury may certify the employee is able to return to work in a "light duty" position. **If the employer offers such a position, the employee is permitted but not required to accept the position (see § 825.220(d)).** As a result, the employee may no longer qualify for payments from the workers' compensation benefit plan, but the employee is entitled to continue on unpaid FMLA leave either until the employee is able to return to the same or equivalent job the employee left or until the 12-week FMLA leave entitlement is exhausted. See § 825.207(d)(2). If the employee returning from the workers' compensation injury is a qualified individual with a disability, he or she will have rights under the ADA.

MATERIALS CITED IN COMMENTS RESPONDING TO THE RFI[9]

DOL Opinion Letters & Guidance
• Dep't of Labor Opinion Letter, FMLA-55 (Mar. 10, 1995), http://www.dol.gov/esa/whd/opinion/FMLA/prior2002/FMLA-55.pdf.

Other Materials
• American College of Occupational & Environmental Medicine, Preventing Needless Work Disability by Helping People Stay Employed (Sept. 2006), http://www.acoem.org/guidelines.aspx?id=566#.

[9] Cases and materials cited in the RFI are excluded from this list. This list does not include surveys cited in reviewed comments.