

## **THE DEFINITION OF “SERIOUS HEALTH CONDITION”** **DOL Topic: B<sup>1</sup>**

**PART ONE OF THIS MEMORANDUM PROVIDES A SUMMARY OF QUESTIONS ASKED AND COMMENTS SUBMITTED IN RESPONSE TO THE DOL REQUEST FOR INFORMATION (“RFI”) ABOUT THE DEFINITION OF “SERIOUS HEALTH CONDITON.”<sup>2</sup>**

**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 FMLA defines “serious health condition” to include: (1) an ailment requiring inpatient care; and (2) an ailment requiring “continuing treatment” by a health care provider.<sup>3</sup> The RFI focused on one provision of the DOL regulations implementing the “continuing treatment” language in the statute. Under the pertinent regulation, a “serious health condition” is defined as an illness, injury, impairment, or physical or mental condition resulting in:

- A period of incapacity of more than three consecutive calendar days that results in either:
  - Treatment two or more times by a health care provider *or*
  - Treatment by a health care provider on at least one occasion that results in a regimen of continuing treatment under the health care provider’s supervision.<sup>4</sup>

With regard to the definition of “serious health condition,” the DOL asked for comments on the following topic:

- Exclusion of Minor Illnesses from the Definition of “Serious Health Condition”

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<sup>1</sup> 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 III.

<sup>2</sup> 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>.

<sup>3</sup> 29 U.S.C. § 2611(11).

<sup>4</sup> 29 C.F.R. § 825.114(a)(2)(i)(B).

**ISSUE: Exclusion of Minor Illnesses from the Definition of “Serious Health Condition”**

- **The RFI asked: Does the current regulatory definition of “serious health condition” contradict congressional intent by allowing for coverage of “minor” illnesses, such as colds, the flu, and earaches?** 29 C.F.R. § 825.114(c) states that, “[o]rdinarily, unless complications arise,” such ailments are not covered under the definition. Consistent with the business community’s interpretation of this provision, the DOL’s initial interpretation of § 825.114(a)(2)(i) excluded minor ailments that met the regulatory definition.<sup>5</sup> But a subsequent opinion letter reversed that interpretation,<sup>6</sup> concluding that any condition that met the criteria of § 825.114(a)(2)(i) constituted a “serious health condition,” and that § 825.114(c) merely states that such conditions will not “ordinarily” meet the definition. The RFI cited two cases interpreting these regulations:
  - **Miller v. AT&T Corp.**, 250 F.3d 820 (4th Cir. 2001). The court affirmed partial summary judgment for the employee by finding that the flu is a “serious health condition” where it meets the regulatory criteria. After noting that it was not necessary to rely on the 1996 DOL opinion letter to reach this conclusion, the court rejected the employer’s argument that the DOL regulation interpreting “serious health condition” was beyond the scope of the DOL’s authority. In the absence of a definition of “continuing treatment” in the statute or legislative history, the court held that the DOL had authority to provide, and had provided, a valid regulatory definition.
  - **Thorson v. Gemini, Inc.**, 205 F.3d 370 (8th Cir. 2000). The court affirmed summary judgment on the employee’s claim by finding that the employee’s diarrhea and stomach cramps met the regulatory definition of “serious health condition” and were therefore covered. The court rejected the employer’s argument that that diarrhea and stomach cramps could not meet the definition of “serious health condition.” The employer argued unsuccessfully that in light of the legislative history, the DOL regulations to the contrary were invalid as beyond the scope of the DOL’s authority. The Court noted that Congress did not define “serious health condition,” and that the definition provided by the DOL was a “permissible construction” of the statute.
- **The RFI asked: Can the substantive portions of the DOL’s definition be retained while simultaneously effecting congressional intent to exclude such conditions?**

<sup>5</sup> Dep’t of Labor Opinion Letter FMLA-57 (April 7, 1995), <http://www.dol.gov/esa/whd/opinion/FMLA/prior2002/FMLA-57.pdf>.

<sup>6</sup> Dep’t of Labor Opinion Letter FMLA-86 (Dec. 12, 1996), <http://www.dol.gov/esa/whd/opinion/FMLA/prior2002/FMLA-86.pdf>.

**ISSUE: Exclusion of Minor Illnesses from the Definition of “Serious Health Condition”**

In asking this question, the DOL noted the “congressional intent that minor illnesses like colds, earaches, etc., not be covered by the FMLA.”

**EMPLOYER-SIDE COMMENTS**

This topic has been the subject of more employer-side comments than any other topic addressed in the RFI (based on WF 2010’s review of 559 comments as of May 2007). Both employers and employer organizations report problems applying the current regulatory definition. Each bold-faced sentence below encapsulates a particular type of comment from employers or employer organizations, and is followed by explanatory text describing the comment in more detail.

- **Section 825.114(c) sets no outer limit on the types of conditions that qualify as “serious health conditions.”** Multiple comments provide examples of certification requests they said had been submitted by employees as proof that the current regulations fail to provide any real limit on what conditions can qualify for FMLA protection. Commenters report that employees have requested leave for minor sunburn, home- schooling an employee’s child, and caring for a sick pet.
  - Employers report that the current definition is vague and confusing. Many comments point to the December 1996 DOL Opinion Letter as the source of the confusion. In conjunction with the ineffective limitations of § 825.114(c), these comments argue that the imprecise definition results in employers simply certifying all FMLA requests because they lack appropriate guidance on what conditions are not covered.
  - The Coalition and SHRM note that, due to the fact-specific nature of “serious health condition determinations,” litigation cannot be resolved at summary judgment, thereby escalating litigation costs over this issue.
- **The regulations should be revised to give effect to Congressional intent to exclude minor conditions.** The regulatory definition is inconsistent with congressional intent, as noted in the legislative history.
  - Changes suggested by the National Coalition to Protect Family Leave (“Coalition”), the Society for Human Resource Management (“SHRM”), and the National Association of Manufacturers (“NAM”):<sup>7</sup> (1) Increase the period of

<sup>7</sup> Most of the employer-side comments support revising the current definition, although not all propose specific changes or endorse these changes offered primarily by organizations.

## EMPLOYER-SIDE COMMENTS

- incapacity required to qualify for FMLA leave from “more than three consecutive days” to either “more than five consecutive business days” or “more than seven consecutive calendar days. This would track the waiting period of most short-term disability plans and exclude minor illnesses. A few commenters also suggest that § 825.114(c) should state explicitly that illnesses that meet the criteria of § 825.114(a) will not meet the definition of “serious health condition” unless complications arise. (2) Modify § 825.114(a)(2)(i)(A) to require that the two treatments occur within the period of incapacity. A few commenters also request a clarification that follow up visits do not qualify as treatments. (3) Eliminate § 825.114(a)(2)(i)(B), which provides coverage for conditions requiring one treatment by a health care provider plus a regimen of continuing treatment.
- In the alternative, clarify that “continuing treatment” must be more than merely taking and refilling a prescription.
- Other suggested changes by employers: (1) Enumerate a list of conditions that meet the definition of serious health condition and specify that conditions not found on the list are not serious health conditions. Employers are particularly concerned that migraines, certain “chronic health conditions,” and allergies should not meet the definition of “serious health condition.” (2) Strike “psychological comfort” from the definition.<sup>8</sup>

## EMPLOYEE-SIDE COMMENTS

Most substantive employee-side comments came from organizations, although a significant number of employees also submitted personal stories about being permitted or denied FMLA leave on grounds that their conditions did or did not qualify as “serious health conditions.” The bullets below encapsulate the employee-side comments.

- No changes should be made to the regulatory definition that would make it more difficult for employees to qualify for FMLA leave. The definition sets forth uniform, common criteria by which the severity of an illness may be adequately judged.
- Section 825.114(c) does not place “limitations” on the test in § 825.114(a). Anecdotal stories from employers about abuse are an insufficient reason to amend the

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<sup>8</sup> Psychological care is part of an employee’s “need[] to care for a family member” under 29 C.F.R. § 825.116, and includes the provision of “psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care.”

## EMPLOYEE-SIDE COMMENTS

regulations, and there is little objective evidence that § 825.114(c)'s limitations do not adequately prevent employees from taking FMLA leave for non-serious health conditions.

- Unilaterally excluding certain minor illnesses could have a devastating impact on employees' health. The test of severity should be measured by a condition's impact on a patient, as illnesses can affect each individual differently. Moreover, the "laundry list" approach was explicitly rejected in the preamble to the FMLA which stated that the reason for its rejection was to prevent employers from only recognizing conditions on the list or second-guessing whether a condition is "serious."
- A handful of individual comments emphasize that certain mental health conditions are quite serious.

**PART TWO**

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

**STATUTE**

**29 U.S.C. § 2611(11)**

The term "serious health condition" means 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.**

**REGULATIONS**

**29 C.F.R. § 825.114**

(a) For purposes of FMLA, "serious health condition" entitling an employee to FMLA leave means an illness, injury, impairment, or physical or mental condition that involves: . . .

(2) Continuing treatment by a health care provider. A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:

(i) A period of incapacity (i.e., inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(A) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or

**(B) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment** under the supervision of the health care provider. . . .

(b) Treatment for purposes of paragraph (a) of this section includes (but is not limited to) examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations. **Under paragraph (a)(2)(i)(B), a regimen of continuing treatment includes, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition** (e.g., oxygen). A regimen of continuing treatment that includes the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave.

(c) Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not "serious health conditions" unless inpatient hospital care is required or unless complications develop. **Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave.** Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions provided all the other conditions of this regulation are met. Mental illness resulting from stress or allergies may be serious health conditions, but only if all the conditions of this section are met.

#### **29 C.F.R. § 825.116**

(a) The medical certification provision that an employee is "needed to care for" a family member encompasses both physical and psychological care. It includes situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor, etc. The term also includes providing psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care.

(b) The term also includes situations where the employee may be needed to fill in for others who are caring for the family member, or to make arrangements for changes in care, such as transfer to a nursing home.

## MATERIALS CITED IN COMMENTS RESPONDING TO THE RFI<sup>9</sup>

### Cases

- *Nawrocki v. United Methodist Ret. Home*, 174 Fed. Appx. 334 (6th Cir. 2006).
- *Mauder v. Metro. Transit Auth. of Harris County*, 446 F.3d 574 (5th Cir. 2006).
- *Kauffman v. Fed. Express Corp.*, 426 F.3d 880 (7th Cir. 2005).
- *Jones v. Denver Pub. Sch.*, 427 F.3d 1315 (10th Cir. 2005).
- *Perry v. Jaguar of Troy*, 353 F.3d 510 (6th Cir. 2003).
- *Caldwell v. Holland of Tex.*, 208 F.3d 671 (8th Cir. 2000).
- *Boyd v. State Farm Ins. Co.*, 158 F.3d 326 (5th Cir. 1998), cert. denied, 526 U.S. 1051 (1999).
- *Wheeler v. Pioneer Developmental Serv.*, No. 02-30159-MAP, 2004 U.S. Dist. LEXIS 24960 (D. Mass. Dec. 8, 2004).
- *Bailey v. Augustine Med., Inc.*, No. 01-695 ADM/AJB, 2003 U.S. Dist. LEXIS 1963 (D. Minn. Feb. 7, 2003).
- *Corcino v. Banco Popular De P.R.*, 200 F. Supp. 2d 507 (D.V.I. 2002).
- *Jones v. Willow Gardens*, No. C98-0007 MJM, 2000 U.S. Dist. LEXIS 3559 (N. Dist. Iowa July 20, 2000).
- *Sicoli v. Nabisco Biscuit Co.*, No. 96-6053, 1998 U.S. Dist. LEXIS 8429 (E.D. Pa. June 8, 1998).
- *Mell v. Weyburn-Bartel, Inc.*, No. 1:96-CV-654, 1997 U.S. Dist. LEXIS 15758 (W.D. Mich. July 28, 1997).
- *Brannen v. OshKosh B'Gosh, Inc.*, 897 F. Supp. 1028 (M.D. Tenn. 1995).

### DOL Opinion Letters & Guidance

- Dep't of Labor Opinion Letter, FMLA-87 (Dec. 12, 1996),  
<http://www.dol.gov/esa/whd/opinion/FMLA/prior2002/FMLA-87.pdf>.

### Other Materials

- CDC, About Antibiotic Resistance (Apr. 21, 2006),  
<http://www.cdc.gov/drugresistance/community/antibiotic-resistance.htm>.

<sup>9</sup> Cases and materials cited in the RFI are excluded from this list. This list does not include surveys cited in reviewed comments.

**Other Materials**

- S. Rep. No. 103-2 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 3.
- Cong. Rec. H9780-81 (daily ed. Nov. 13, 1991).
- Cong. Rec. S13181 (daily ed. Oct. 2, 1991).