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The FMLA – What's New as of its 20th Birthday

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The 1993 Family and Medical Leave Act ("FMLA" or the "Act") turned 20 in 2013. To mark its 20th birthday, the U.S. Department of Labor released the 2012 FMLA Survey Report and issued a final rule implementing important expansions of FMLA protections and making other clarifications and revisions to FMLA regulations. This alert discusses the survey and the final rule, as well as anticipated proposed legislation, which would build on the FMLA and set a national standard for paid sick leave.

The 2012 Department of Labor FMLA Survey Report

On February 4, 2013, the U.S. Department of Labor released a survey, entitled "Family and Medical Leave Act in 2012: Final Report." The survey (which is an update to similar surveys in 1995 and 2000) was conducted by a Cambridge, Mass.-based global research firm, Abt Associates. In 2012, Abt surveyed 1,812 worksites and 2,852 employees about experiences with the FMLA. The worksite survey included both covered and not-covered workplaces. The employee survey included FMLA eligible and non-eligible employees, as well as those who took leave, those who had an unmet need for leave, those who had both, and those who had neither.

Most employers who participated in the survey gave good marks to FMLA. Ninety-one percent of employers reported that complying with the FMLA has had either a positive effect or no noticeable effect on employee absenteeism, turnover and morale. The negative reports were found to be more common among large firms (29%).

Most covered worksites (that is, 50 employees within 75 miles) also reported little difficulty complying with the FMLA (only 14% report "somewhat difficult"; only 1% report "very difficult"). However, larger employers were more likely to report difficulty complying (3 percent for "very difficult" and 29 percent for "somewhat difficult").

According to employers, the easiest leave to deal with was short and planned. Employers reported that other types of leave were harder to deal with, i.e., in increasing order of difficulty: planned long-term leave, planned episodic or intermittent leave, unplanned episodic or intermittent leave, and unscheduled leave of any duration.

The report recognized the challenge employers face to sustain worksite productivity when an employee is out on leave. The most common response, by far, as to how employers addressed the absences was to temporarily assign the work to other employees (74.1%). The only other common response was to hire a temporary replacement. According to employers, short leaves were more likely to be handled by putting the work on hold until the employee returned; longer leaves were more likely to be handled by assigning the work temporarily to other employees, hiring a temporary replacement, or calling in an employee on vacation.

According to the survey, the breakdown of the reasons for which FMLA was taken was as follows:

- the employee's own illness – 57%,
- pregnancy or a new child – 22%,
- illness of qualifying relative (spouse, child, or parent) – 19%, and
- other, including military reasons – 2%.

The survey found that most leave was short. Nearly half of all leave events lasted 10 days or less (42%); less than a fifth (17%) lasted more than 60 days. The study also found that intermittent leave was not common (only about 3% of employees took it). Very few covered employers reported suspicion of FMLA misuse (2.5%).

In the survey, employees were also asked how hard it was to make ends meet while on FMLA. Two-thirds reported some level of difficulty (29.9% very difficult, 32.1% somewhat difficult). Nearly half reported that they would have taken longer leave if more (any) pay had been available (43.1%). These results were similar to those in the 2000 Report. The survey responses also suggested that *paid* parental leave is not common. About a third of worksites offer paid maternity leave to all or most female employees. Paid paternity leave was slightly less common.

In addition to the statistics, the survey contains a number of FMLA compliance reminders for employers. For example:

- The survey asked about the employers' use of "no-fault attendance" policies during employees' FMLA leave. Despite Wage and Hour Division Opinion Letter's (FMLA, 2003) clarification that an employee may not be assessed "points" when leave is taken for a qualifying FMLA reason, the survey showed that these types of policies are still in place in about 40 percent of all worksites.
- Under the FMLA, employers are not allowed to pressure employees to return to work. Nevertheless, 12.4 percent of eligible employees reported employer's pressure as a reason why they returned. Similarly, under the FMLA, employees on leave should not lose seniority or potential for job advancement. Nevertheless, 22.2 percent of eligible employees reported such concern as a reason why they returned to work.
- For long FMLA leaves (i.e., a week or more), employees were frequently (70.5%) asked to perform some work while on leave. This is prohibited by the FMLA, which prohibits employers from interfering with employees while on leave.
- Some employees reported that they did not take leave due to fear of losing their job.

Overall, the 2012 survey showed that employees appeared to understand and make use of the intended benefits under the FMLA; and employers appeared to have efficiently integrated the administration of the FMLA into their ongoing operations without undue burden -- but other employers have policies that violate the FMLA 20 years after its enactment.

New Legislation – Paid Family Leave Insurance Program

On February 4, 2013, Sen. Tom Harkin (D-Iowa), chairman of the Senate Health, Education, Labor, and Pensions Committee, speaking about FMLA leave issues, recognized the challenges families face due to the loss of income while taking unpaid FMLA leave. Consequently, Harkin announced that he would be re-introducing The Healthy Families Act, which would build on the FMLA and set a national standard for paid sick leave. Harkin's announcement coincided with the FMLA's 20th birthday.

The Healthy Families Act would allow employees to earn paid sick time to address medical needs and care for family members. Specifically, employees would earn 1 hour of paid sick time for every 30 hours worked, up to 56 hours (7 days) of paid sick time per year. Employees could use that time to stay home and get well when they are ill, to care for a sick family member, to obtain preventative or diagnostic treatment, or to seek help if they are victims of domestic violence. Small employers with fewer than 15 employees would be exempt from the Act. Employers that already provide this sick leave would not have to change their current policies at all, as long as their existing leave could be used for the same purposes described in the Act.

Final Rule to Implement Statutory Amendments to the FMLA

On February 6, 2013, to mark the FMLA's 20th birthday, the U.S. Department's of Labor also issued and published in the Federal Register a final rule implementing the law's protections to families of veterans and airline flight crews and making other clarifying changes.

More specifically, the final rule amended certain regulations of the FMLA to implement: (i) the National Defense Authorization Act for Fiscal Year 2010 (the "FY 2010 NDAA") amendments to the military leave provisions of FMLA, and (ii) the Airline Flight Crew Technical Corrections Act's ("AFCTCA") amendments to the hours of service requirements for airline flight crew employees. The final rule also added new leave calculation regulations for flight crew employees, and clarified existing regulatory provisions related to intermittent leave, as well as made other clarifying changes and technical corrections. The major provisions of the final rule include:

Amendments to Military Leave Provisions

The FY 2010 NDAA extended the availability of FMLA leave to family members of members of the Regular Armed Forces for qualifying exigencies arising out of the service member's deployment and also extended FMLA military caregiver leave for family members of current servicemembers to include an injury or illness that existed prior to service and was aggravated in the line of duty on active duty, as well as extended FMLA military caregiver leave to family members of certain veterans with serious injuries or illnesses.

Qualifying Exigency Leave

The final rule revised the FMLA regulations to reflect the expansion of qualifying exigency leave to include eligible employees with family members serving in the Regular Armed Forces. Under the new regulations, "active duty" is now "covered active duty" and requires deployment to a foreign country.

The rule also increased the length of time an eligible family member may take for the qualifying exigency leave reason of "Rest and Recuperation" from five days to up to a maximum of 15 days.

The list of required information for certification for qualifying exigency leave for "Rest and Recuperation" leave was expanded to include a copy of the military member's "Rest and Recuperation" leave orders, or other documentation issued by the military setting forth the dates of the military member's leave.

The final regulations also added a new category of qualifying exigency leave. Eligible employees are now entitled to "parental care leave" to care for a military member's parent who is incapable of self-care when the care is necessitated by the member's covered active duty. Leave under this provision may include arranging for alternative care, providing care on an immediate need basis, admitting or transferring the parent to a care facility, or attending meetings with staff at a care facility.

Military Caregiver Leave

The final rule expanded the definition of serious injury or illness to include pre-existing injuries or illnesses of current service members that were aggravated in the line of duty.

It also expanded military caregiver leave to care for covered veterans. Pursuant to the rule, a "covered veteran" is defined as "an individual who was a member of the Armed Forces (including a member of the National Guard or Reserves), and was discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date the eligible employee takes FMLA leave to care for the covered veteran."

Notably, the period between enactment of the FY 2010 NDAA on October 28, 2009, and the effective date of the 2013 Final Rule is excluded in the determination of the five-year period for covered veteran status.

The final rule also created a flexible definition for "serious injury or illness of a covered veteran," which includes four alternatives, only one of which must be met. Based on the final rule, eligible employees are permitted to obtain certification of a service member's serious injury or illness (both current service members and veterans) from any health care provider as defined in the FMLA regulations, not only those affiliated with the DOD, VA, or TRICARE networks (as was permitted under the 2009 regulations).

Amendments to Airline Flight Crew Employees Leave Provisions

Because flight crews work on a monthly schedule and their schedules often include on-call time, in addition to active work time, the previous FMLA rules using the workweek framework did not work for the airline industry. The final rule implemented the amendments made to the FMLA by the AFCTCA, to establish special hours of service eligibility requirements for airline flight crew employees.

Pursuant to the new regulation, "[t]he hours of service criteria will be met if during the previous 12-month period the airline flight crew employee has worked or been paid for not less than 60% of the applicable monthly guarantee and has worked or been paid for not less than 504 hrs (not including commute time, vacation, sick, or medical leave)."

The final rule adopted a uniform entitlement for airline flight crew employees of 72 days of leave for one or more of the FMLA-qualifying reasons other than military caregiver leave and 156 days of military caregiver leave. The final rule further provides that employers must account for an airline flight crew employee's FMLA leave usage utilizing an increment no greater than one day.

According to the final rule, "[e]mployers of airline flight crew employees must maintain certain records, including any records or documents that specify the applicable monthly guarantee for each category of employee to whom the guarantee applies, including any relevant collective bargaining agreements or employer policy documents that establish the applicable monthly guarantee; as well as records of hours scheduled."

Clarifying Changes Regarding Intermittent Leave

The revisions contained in the final rule also included clarifications to the rules for calculation of intermittent or reduced schedule FMLA leave. The clarifying language was added that an employer may not require the employee to take more leave than necessary to address the circumstances that precipitated the need for leave, and that FMLA leave may only be counted against an employee's FMLA entitlement for leave taken and not for time that is worked for the employer. Another clarification that was added is that employers must track FMLA leave using the smallest increment of time used for other forms of leave subject to a one hour maximum.

FMLA Forms

The final rule updated the FMLA optional use forms (WH-380, WH-381, WH-382, WH-384, and WH-385) to reflect the statutory changes, created a new optional use form for the certification of a serious injury or illness for a veteran (WH-385-V), and removed the forms from the regulations. The new and revised forms are available on the WHD website. Employers are permitted to use forms other than those issued by the DOL so long as they do not require information beyond that specified in the regulations. Importantly, if an employee provides sufficient certification regardless of format, no additional information may be requested.

Other Changes

In addition to removing the FMLA forms from the regulations, the DOL reorganized the regulations to enhance clarity and made some other technical corrections.

The rule included modifications to ensure consistency with other statutes, such as amending references to the Uniformed Services Employment and Reemployment Rights Act (USERRA) to more closely mirror the USERRA regulations. Pursuant to the rule, the protections afforded by USERRA extend to all military members (active duty and reserve), and all periods of absence from work due to or necessitated by USERRA-covered service is counted in determining an employee's eligibility for FMLA leave.

The final rule also updated the recordkeeping requirements to specify an employer's obligation to comply with the confidentiality requirements of the Genetic Information Nondiscrimination Act of 2008 (GINA).

Takeaways

Employers covered by FMLA should review their FMLA practices to make sure they do not include prohibited practices identified in the survey and should also keep an eye on new federal legislation that is expected to be re-introduced by Sen. Tom Harkin.

Furthermore, to comply with the regulations, such as the expansion of qualifying exigency leave to families of members of the Regular Armed Forces and the special eligibility hours of service requirement for flight crew employees, which were effective as of the enactment date of those statutes, as well as new regulations, including military caregiver leave for a veteran, qualifying exigency leave for parental care, and the special leave calculation method for flight crew employees, which take effect on March 8, 2013, employers will need to:

- update the existing FMLA policies to include new and changed requirements set forth in the final rule;
- replace the existing notice and certification forms with the new forms available on the Wage and Hour Division website, www.dol.gov/whd, as well as at local Wage and Hour district offices;
- train HR professionals and managers to insure their understanding of and compliance with the new FMLA rules;
- replace the old FMLA poster with the new one, incorporating the newest amendments, which is available at http://www.dol.gov/whd/regs/compliance/posters/fmla.htm; and
- review employee handbooks and/or other HR policies to make certain that they do not conflict with the new FMLA rules.

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If you have any questions or concerns regarding the FMLA and the new regulations, please contact your Proskauer lawyer or any member of the Employment Law Counseling & Training Group.

Related Professionals

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