Morgan Lewis

together

Q&A Session for "What a Year Ahead! An Overview of Labor and Employment Related Legislation and Its Impact on Employers"

Date: March 11, 2009

Thank you all for your questions. We have attempted below to answer them. However, in this area of the law grey areas still exist and the answers to almost all of the questions could be significantly impacted by the specific facts in each situation. Accordingly, while we hope these answers can help provide some guidance, no answer should be relied upon exclusively in making any decisions or in establishing any practice, policy or procedure. Before any final decisions are reached, you should consult with a trusted advisor who is familiar with the wage and hour laws and describe in detail the facts applicable to your individual situation.

Q: Does incremental leave apply to exempt employees in hourly increments or can we track this by half days since this is the minimum amount that exempt- level employees can take off?

A: Yes, intermittent leave rules apply to exempt employees. We would not recommend tracking intermittent leave in half-day increments, as the final rule states that the employer must use an increment no greater than the shortest period of time that the employer uses to account for use of other forms of leave, *provided that it is not greater than one hour* and provided further that an employee's FMLA leave entitlement may not be reduced by more than the amount of leave actually taken.

Q: In supplementing disability pay with paid leave, is that for only the difference in the pay to reach 100% pay, or is this going to be a policy or carrier decision? I would hope it only supplements disability pay.

A: As you know, the final rule provides that the employer and employee may agree to have paid leave run concurrently with FMLA leave to supplement disability benefits, as long as such an agreement is permitted under applicable state law. While the rule itself does not limit that supplement to the difference between disability pay and 100 percent of an employee's regular income, employers are free to impose that limitation as long as the limitation does not otherwise conflict with applicable state law. For that reason, we often recommend that employers include in their FMLA policies a statement that "in no circumstance will an employee be able to receive a combination of paid leave and benefits that exceeds 100 percent of the employee's regular income while taking FMLA leave, unless otherwise provided by state law."

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Keep in mind, however, that the state law interplay is important. Employees in California, for example, may be entitled to a supplement that would exceed 100 percent of his or her regular income in certain circumstances.

Q: Are there any changes regarding employees who have mental health/bipolar conditions?

A: While there are no changes *specific* to employees who have mental health or bipolar conditions, employers do need to reconsider how they treat conditions like depression and bipolar disorder that are managed by using anti-depressant medication. In the past, employers were permitted to analyze for purposes of the ADA the alleged disability *and* any "mitigation measures" (i.e., the anti-depressant) to determine whether the condition qualified as a disability. That is no longer the case. Mitigating measures now cannot be analyzed in interpreting an employee's alleged disability and as a result, conditions like bi-polar disorder and depression may now fall under the protections of the ADA.

Q: We have an employee from a vo-tech school who requested reducing his hours from 20/week to only 10/week to accommodate his school schedule. He is overwhelmed as a full time student, and would like to cut back on his work schedule. He is not eligible for FMLA, but I am concerned he may be covered under ADAAA, since he may be learning disabled. After speaking with him, we are allowing him to work a 10-hour schedule for one month, but do not want to extend this accommodation any longer. Your thoughts?

A: While we do not know many of the details of your employee's specific situation and prefer to reserve judgment without those details, we are not convinced that you need to accommodate this particular individual. While his learning disability may well be covered under the ADAAA, you would be accommodating his ability to attend school, not his disability as it relates to your workplace.

Q: Can we still charge the 2% administrative fee?

A: Yes, employers can charge the administrative fee. The subsidy is calculated on the COBRA premium including the 2% administrative fee.

Q: Has DOL provided sample notices to affected AEIs? If not, is this anticipated and when?

A: The Secretary of Labor was directed to issue model notices by March 19. We expect that they will be available through the Department of Labor website at: http://www.dol.gov/ebsa/COBRA.html.

Q: Under the COBRA provisions of the American Recovery and Reinvestment Act of 2009, who are "assistance eligible individuals"? Any employees involuntarily terminated during the period of September 1, 2008 to December 31, 2009?

A: Employees who suffer an involuntary termination of employment on or after September 1, 2008 and before January 1, 2010 and are eligible for COBRA are entitled to

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the enhanced rights and 65% subsidy under the stimulus plan. By way of comparison, the COBRA provisions of the stimulus plan do not apply to any qualified beneficiary whose employment was terminated prior to September 1, 2008—even if his or her termination was involuntary. The COBRA provisions also do not apply to anyone whose employment termination was due to gross misconduct or if COBRA rights initially arose for any reason other than an involuntary termination of employment, such as a reduction in hours, voluntary termination of employment, death, divorce, or attainment of majority.

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