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2013 Labor and Employment Webinar Series

Catching up with the FMLA —

New Employer Requirements for U.S. Leave Laws

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Agenda

- Overview of new FMLA regulations issued in February 2013
- Highlights of case developments affecting employers' ability to manage FMLA
- State and local law developments affecting FMLA administration

Background on FMLA Amendments

- The FMLA was amended in January 2008 to provide the following types of military family leave for FMLA-eligible employees:
  - Exigency leave: A 12-week entitlement for eligible family members to deal with exigencies related to a call to active duty of service members of the National Guard and Reserves.
  - Military caregiver leave: A 26-week entitlement for eligible family members to care for seriously ill or injured service members of the regular Armed Forces, National Guard, and Reserves.

Background on FMLA Amendments

- Less than a year later, Congress again amended the FMLA through the National Defense Authorization Act for Fiscal Year 2010 (FY 2010 NDAA), P.L. No. 111-84. In this act, Congress expanded both types of military family leave by doing the following:
  - Expanded exigency leave to include the family members of those in the regular Armed Forces but added the requirement that service members be deployed to a foreign country.
  - Expanded military caregiver leave to include the family members of certain veterans with serious injuries or illnesses receiving medical treatment, or therapy, or recuperating if the veteran was a member of the Armed Forces at any time during the five years preceding the date of the medical treatment, therapy, or recuperation.
  - Extended military caregiver leave to the families of current service members with a preexisting condition aggravated by military service in the line of duty.
- In 2009, Congress also passed the Airline Flight Crew Technical Corrections Act (AFCTCA), P.L. 111-119, to provide an alternative eligibility requirement for airline flight crew employees.

Definition of “Active Duty”

Section 825.126(a), now section 825.126(a)(1) and (a)(2)

- The Final Rule replaces the existing definition of “active duty” with two new definitions:
  - "covered active duty," as it applies to members of the regular Armed Forces, requires that the service member be deployed with the Armed Forces in a foreign country.
  - "covered active duty or call to covered active duty," as it applies to members of the Reserves, requires that the service member be under a call or order to active duty during the deployment of the member to a foreign country under a federal call or order to active duty in support of a contingency operation.
- While the FY 2010 NDAA struck the term "contingency operations" from the FMLA, the DOL has taken the position that members of the Reserves must be called to duty in support of a contingency operation in order for their family members to be entitled to qualifying exigency.

Exigency Leave for Rest and Recuperation

Section 825.126(a)(6), now section 825.126(b)(7)

- The Final Rule increases the maximum number of calendar days from 5 to 15 for exigency leave to bond with a military member on rest and recuperation leave, beginning on the date the military member begins his or her rest and recuperation leave.
- The leave may be taken intermittently, or in a single block, as long as the leave is taken during the period of time indicated on the military member's rest and recuperation orders.

New Exigency Leave for Parental Care

Now section 825.126(b)(8)

- The Final Rule adds parental care as a qualifying exigency for which leave may be taken. This allowance tracks the child care exigency provision and allows parental care exigency leave for the parent of a military member in order to do the following:
  – Arrange for alternative care for a parent of the military member when the parent is incapable of self-care and the covered-active-duty or call-to-covered-active-duty status of the military member necessitates a change in existing care arrangements.
  – Provide care for a parent of the military member on an urgent, immediate-need basis (but not on a routine, regular, or everyday basis) when the parent is incapable of self-care and the need to provide such care arises from the covered-active-duty or call-to-covered-active-duty status of the military member.

New Exigency Leave for Parental Care

Now section 825.126(b)(8)

- Admit or transfer a parent of the military member to a care facility when the admittance or transfer is necessitated by the covered-active-duty or call-to-covered-active-duty status of the military member.
- Attend meetings with staff at a care facility for a parent of the military member (e.g., meetings with hospice or social service providers) when such meetings are necessitated by the covered-active-duty or call-to-covered-active-duty status of the military member.

- The military member's parent must be incapable of self-care, which is defined as requiring active assistance or supervision to provide daily self-care in three or more "activities of daily living" (e.g., grooming, dressing, and eating) or "instrumental activities of daily living" (e.g., cooking, cleaning, and paying bills).

Definition of “Covered Veteran” for Caregiver Leave-§ 825.127

A covered service member includes (i) a covered veteran, (ii) who is undergoing medical treatment, recuperation, or therapy, and (iii) for a serious injury or illness.

- A "covered veteran" is defined as a member of the Armed Forces, National Guard, or Reserves who 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.
- The Final Rule excludes the period between October 28, 2009 and March 8, 2013 (the effective date of the Final Rule) from the five-year "look back" for covered veteran status. This grace period attempts to address complexities stemming from the DOL's position that military caregiver leave did not become effective for veterans until its proposed rules became final.
- The DOL has taken the position that leave provided to veterans under this provision before March 8, 2013 cannot be counted against an employee's leave entitlement because companies provided the leave voluntarily before the effective date of the Final Rule. It is unclear if the courts will agree with this interpretation.

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Definition of “Covered Veteran”

The covered veteran must have an injury or illness incurred in, or preexisting but aggravated in, the line of duty on active duty that meets one of the following conditions:

- A continuation of a serious injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces and that rendered the service member unable to perform the duties of the service member's office, grade, rank, or rating;
- A physical or mental condition for which the covered veteran has received a U.S. Department of Veterans Affairs Service-Related Disability (VASRD) rating of 50% or greater, with such VASRD rating being based, in whole or in part, on the condition precipitating the need for Armed Services leave;
- A physical or mental condition that substantially impairs, or would do so absent treatment, the covered veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service; or
- An injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers.

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Certification Requirements

Modifies limitations on certification provisions for military caregiver leave.

- Now allows certification from any healthcare provider otherwise authorized to certify a serious health condition under the other FMLA provisions—not only those affiliated with the DOD.
- If the certification comes from a DOD-affiliated provider, second and third opinions are not permitted.

AFCTCA-Special Eligibility Requirements

- An airline flight crew employee will meet the hours-of-service eligibility requirement if he or she:
  - Has worked (duty hours) or been paid (received wages) for not less than 60% of the applicable total monthly guarantee (or its equivalent); and
  - Has worked or been paid for not less than 504 hours (not including personal commute time or time spent on vacation or medical or sick leave) during the previous 12 months.
- Airline flight crew employees continue to be subject to the FMLA's other eligibility requirements.

AFCTCA

- For regular flight crew employees, the “applicable monthly guarantee” is defined as the minimum number of hours for which an employer has agreed to schedule an employee in a given month.
- For flight crew employees on reserve status, the “applicable monthly guarantee” is defined as the number of hours for which an employer has agreed to pay an employee for any given month. For airline employees who are not on Reserve, the applicable monthly guarantee is the minimum number of hours for which an employer has agreed to schedule such employees for any given month.

AFCTCA-Calculation of Leave

- Uniform leave bank for “basic” FMLA leave of up to 72 days in a 12-month period for flight crews.
- Airline flight crew employees are entitled to up to 156 days of military caregiver leave.
- Employers may account for intermittent leave using an increment of no greater than one day (defined as a “calendar” day).
- If an employer returns an employee to work on a given day, it may not count as a full day of leave.
- Physical impossibility rule applies.
- Note the burden on the employer to keep records (special recordkeeping requirements apply).

Additional Clarifications Provided by New Rule

- Language added to clarify that:
  - An employer may not require an employee to take more leave than is necessary to address the circumstances that precipitated the need for leave.
  - If an employer chooses to waive its increment-of-leave policy in order to return an employee to work at the beginning of a shift, the employer is likewise choosing to waive further deductions from the FMLA entitlement period. In other words, if the employee is working, the time cannot count against FMLA time, no matter what the smallest increment of leave may be.
  - The physical impossibility provision is limited to the period during which an employer is unable to permit an employee to work prior to or after the FMLA period.
  - GINA requirements apply to FMLA certifications.

DOL Administrator Interpretation

- In January 2013, the DOL issued Administrator's Interpretation FMLA No. 2013-1
  - Under this Interpretation of the FMLA, a disabled son or daughter would also include a child whose disability occurred or manifested at 18 years of age or older.
  - This allows parents greater ability to care for adult sons and daughters who have a disability and are unable to care for themselves as a result of this Interpretation.

Managing FMLA Abuse

- What can you do to manage what you believe to be FMLA abuse?
  - Recertification
  - Clarifications and authentication
  - Surveillance
  - Second and third opinions
  - Requiring employees to use accrued paid time off (PTO) during FMLA leave, where allowed by law.

Recent Case Law

District of New Jersey case, May 23, 2013:

- Plaintiff had PTSD, fibromyalgia, asthma and sinus disease.
- She had persistent performance problems.
- In 2010, she exhausted her PTO-using some of it during an FMLA-covered leave.
- Thereafter, she was disciplined for overusing sick time and told she was an “abuser of time.”
- She asked to purchase vacation and was denied, though others were allowed to.
- In July 2011, she requested another leave and was discouraged.
- In October 2011, she requested FMLA leave for PTSD/anxiety. Her supervisor gave her notices only after her attorney sent a letter.
- Before she returned from the leave, her supervisor recommended that she be terminated.

Recent Case Law:

District of New Jersey case, May 23, 2013 (cont.):

- The court denied defendant's motion for summary judgment:
  - Plaintiff was entitled to a jury trial on FMLA retaliation because she was disciplined for overusing PTO after she used some of that PTO for an FMLA-covered leave.
  - Fact issue as to whether declining plaintiff's request to purchase vacation time was FMLA retaliation.
  - Fact issue as to whether plaintiff's supervisor interfered with her FMLA rights in October 2011.
  - Reasonable jury could find that the termination was retaliation for exercising FMLA rights.

Recent Case Law

Seventh Circuit opinion, August 3, 2012:

- Employer suffered widespread absenteeism at a manufacturing plant in Indianapolis.
- The company hired a private investigator to follow 35 employees suspected misusing leave.
- Plaintiff had been granted IFMLA to care for his mother, who resided in a nursing home.
- One day, plaintiff used IFMLA to care for his mother, but surveillance showed that he never left his home.
- When confronted, plaintiff said he could not remember what he did that day. Later he provided documents showing he went to the nursing home, but they were inconsistent.
- Plaintiff was terminated based upon an "honest suspicion that he had abused his leave."

Recent Case Law

Seventh Circuit opinion, August 3, 2012 (cont.):

- The Seventh Circuit Court of Appeals affirmed the lower court's grant of summary judgment to the employer:
  - Employees may only take FMLA leave "for the intended purpose"
  - Though the court noted the investigation (which was limited to surveillance and an interview of plaintiff and collection of the notes) could have been "more thorough," the court held that a history of absenteeism, video surveillance, and suspicious documentation was enough to justify reasonable suspicion.
  - Terminating an employee on the basis of an "honest suspicion" that the employee abused the leave is **not** interference with FMLA leave.

Recent Case Law

Southern District of Ohio case, November 20, 2012:

- Plaintiff had history of poor attendance, and had exhausted his PTO.
- Plaintiff was approved for IFMLA leave for mental health issues.
- Plaintiff requested personal time off to attend horse races on Sept. 22, 2010, but was denied.
- Plaintiff then called out on IFMLA leave on Sept. 23 and 24, 2010.
- The employer knew that the horse races were a week-long event and suspected leave abuse.
- The employer prepared a release that would have allowed the employer to investigate the leave.
- When told that the employer would investigate the potential abuse, plaintiff became angry, said “see you in court,” and stormed out. The employer assumed plaintiff had resigned and terminated his employment.

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Recent Case Law

<u>Southern District of Ohio case, November 20, 2012 (cont.)</u>:

- The court granted summary judgment to the employer:
  - The FMLA does not prevent employers from ensuring that employees do not abuse their leave. Investigations are permitted.
  - Investigating suspected abuse on the basis of a reasonable suspicion is not a denial of FMLA leave. Thus, plaintiff could not establish a prima facie case of FMLA interference.
  - An employer may terminate an employee for a legitimate reason unrelated to the exercise of FMLA rights, such as a “violat[ion] of company policies governing dishonesty,” even where that dishonesty arises in the context of an FMLA investigation.
  - An employee’s use of leave for days that he or she previously requested as vacation days is a factor that can be taken into account by the employer.

Recent Case Law

Eastern District of Michigan case, February 5, 2013:

- Plaintiff was a nurse who developed back and leg pain and went on 12 weeks' leave.
- Prior to her leave, plaintiff had booked a trip to Mexico. Her doctor approved the trip because it would not impair her recovery.
- Plaintiff posted vacation photos to Facebook that were reported by coworkers.
- Plaintiff's supervisor sent an email to plaintiff stating that since she was well enough to go to Mexico, her supervisor assumed she would be returning to work.
- In response, plaintiff claimed she had used a wheelchair while traveling.
- Plaintiff was confronted with her Facebook pictures, and reminded that airports have cameras.
- Plaintiff then admitted to lying about using a wheelchair and was terminated for dishonesty.

Recent Case Law

Eastern District of Michigan case, February 5, 2013 (cont.):

- The court granted the employer's motion for summary judgment:
  - It was undisputed that plaintiff had lied to her supervisor about using a wheelchair, a terminable offense under company policy.
  - This dishonesty justified termination, as employees using FMLA leave are not entitled to greater rights than those not using FMLA leave.
  - The Facebook photos and admission of dishonesty were "evidence and particularized facts" that supported an honest belief that plaintiff had misused her leave.

Recent Case Law

Third Circuit case, July 25, 2012:

- Plaintiff, a physician, suffered from ulcers and depression.
- Plaintiff was granted FMLA leave. Her doctor certified that she could not leave home and could not work at all.
- While on leave, plaintiff worked from home for another employer in violation of policy.
- Plaintiff was terminated and sued alleging FMLA interference.

Recent Case Law

<u>Third Circuit case, July 25, 2012 (cont.)</u>:

- The Third Circuit Court of Appeals affirmed summary judgment for the employer:
  - The FMLA does not shield an employee from discipline, including termination, simply because the conduct occurred while the employee was on protected leave.
  - The court found that the employer had terminated plaintiff for reasons "entirely unrelated" to her legitimate exercise of FMLA rights, including the honest belief that she had misused FMLA leave.
  - The court held that it was "beyond dispute" that the employer believed that plaintiff had misused her FMLA leave by working "despite her assertion and a doctor's note that a serious medical condition prevented her from working."

State Law Issues—Sick Leave

- State sick leave laws
  - May require PTO for periods of illness
    - *D.C.*
    - *San Francisco*
  - May provide for a certain period of the leave to be paid
  - State entitlement may not extend the FMLA period, but may provide that a portion of the FMLA leave must be paid

State Law Issues-Pregnancy and Childbirth

- Many states have laws providing for additional or different leave for pregnancy and/or childbirth
  - Often available to all employees (or broader group than FMLA provides for)
  - Many states have nondiscrimination laws
  - May create an entitlement in addition to the FMLA
    - *California – four months for disability relating to pregnancy and/or childbirth*
  - Massachusetts – 8 weeks per child
  - New Hampshire – for a reasonable period
  - New Jersey, Washington, Wisconsin, Minnesota, etc.

State Laws—Adoption Laws

- Adoption nondiscrimination laws (e.g. Colorado)
- Minnesota (6 weeks of unpaid leave for employers with 21 employees at a single location)
- Wisconsin

State Laws—Paid Family Leave

- Laws that provide for paid leave during some portion of FMLA leave
  - California – Paid Family Leave funded by employee contributions
  - New Jersey – Paid Family Leave funded by employee contributions
  - State disability programs

State laws—Military Leave

- California
  - Leave provided for spouse of person on active military service

State laws—Workers' Compensation

- Workers' comp laws are state specific
- May provide benefits during FMLA leave
- May require extended leave
- May impact decisions regarding return to work
- May provide notice that FMLA leave is needed

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State Laws—Domestic Partners

- Nondiscrimination laws
- Laws that extend leave rights that are generally concurrent with FMLA leave to domestic partners
  - California
  - CFRA applies to domestic partners, but FMLA does not
- States that allow same-sex spouses
  - State leave laws will apply
  - State leave laws may not run concurrently with FMLA

State Laws—Certification Requirements

- Certification requirements may be different
  - California – cannot ask about employee diagnosis
- Check for state and local restrictions on information requests
- Be aware of disabilitiy accommodation issues that may be state specific

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