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EDITORS

EXPANDING FMLA PROTECTIONS: Why Some Of Your Employees Could Be Asking For 26 Weeks Of Leave

The Family and Medical Leave Act of 1993 (FMLA) allows eligible employees to take up to 12 weeks of unpaid leave during any 12-month period for one of the following reasons: (1) for the birth and care of the newborn child of the employee; (2) for placement with the employee of a child for adoption or foster care; (3) to care for an immediate family member (spouse, child or parent) with a serious health condition; or (4) to take medical leave when the employee is unable to work because of a serious health condition. Generally, most employers with 50 or more employees are covered by the Act. Employers in every industry are becoming more familiar with the Act and its requirements and the number of FMLA complaints filed with the Department of Labor (DOL) has decreased over the last four years.¹ Nevertheless, in 2007, the DOL sought recovery of \$1,573,501 in past wages for employees aggrieved by FMLA violations.² Implementing guidelines and compliance with the Act remains a challenge for most employers. Recently, two major developments have resulted in the expansion of FMLA protection for covered employees.

1. Amendments Expand Leave for U.S. Armed Service Members and Their Families

On January 28, 2008, President Bush signed into law H.R. 4986, the National Defense Authorization Act for FY 2008 ("NDAA"), Pub. L. 110-181. Section 585 of the NDAA amends the FMLA, (a) creating an additional category of 12 week leave for qualifying exigencies and (b) providing a new, extended 26 week leave entitlement for U.S. Armed Service members and their families. Notably, the NDAA amendments do not change other aspects of the FMLA, including covered employers and employee eligibility requirements.

a. Qualifying Exigency Leave

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The NDAA amendments create a new category of 12 week leave that allows an eligible employee to take leave due to "any qualifying exigency...arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation."³ The term "qualifying exigency" is not defined by the NDAA, but rather will be defined in regulations to be promulgated by the DOL. As such, this provision does not technically become effective until the final regulations are issued, but the DOL is urging employers to provide such leave in the interim.

b. Service Member Family Leave

The NDAA amendments also create an extended leave FMLA period to permit a "spouse, son, daughter, parent, or next of kin" to take up to 26 workweeks of leave during a 12-month period to care for a "member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness." The NDAA amendments add a new category of employees eligible for such leave: next of kin, which is a new familial term under the FMLA. "Next of kin" is defined as the nearest blood relative of that individual. This provision is effective as of January 28, 2008, and while regulations have not yet been issued, the DOL is requiring employers to provide such leave in good faith.

Although the NDAA creates an additional category of 12 weeks leave, the amendments restrict the total amount of leave taken under the FMLA for any one employee to 26 weeks in any 12 month period. Thus, if an employee had previously exhausted 12 weeks of FMLA leave available to such employee, the employee is only allowed an additional 14 weeks under the new NDAA family leave. Similarly, if the employee exhausts all 26 weeks available under the NDAA family leave, they are not allowed any further FMLA leave during a single 12 month period. The new amendments also make clear that both types of leave may be taken on an intermittent basis or on a reduced leave schedule by the employee.

2. New FMLA Regulations proposed by the DOL

On February 11, 2008, the DOL proposed 477 pages of new FMLA regulations, in what represents the most

comprehensive update since the statute's enactment in 1993. The proposed regulations seek to address the myriad of questions and concerns raised throughout the FMLA's 15-year history. For example, one of the most frequent complaints from employers was that employees could be absent from work for up to two days before having to notify employers that the time already taken off was FMLA leave. Under the proposed regulations, however, employees would have to follow any procedures established by their employers for notification of FMLA leave (except in emergency situations).

In addition to responding to employers' complaints, the DOL has attempted to address and reconcile disagreement among the courts, providing employers with some degree of certainty and uniformity. In particular, the new FMLA regulations seek to clarify:

1. Procedures related to required notices, medical and fitness-for-duty certifications, and designation of leave;
2. When an employee's inability to work overtime exhausts FMLA leave;
3. That light duty does not exhaust FMLA leave; and
4. The definition of a "serious health condition."

The new FMLA regulations also seek to allow employers to:

1. Deny certain bonuses to employees who do not qualify for them because they took FMLA leave;
2. Require employees to comply with the terms and conditions of their paid-leave policies to substitute paid leave for FMLA leave; and
3. Voluntarily settle claims of past FMLA violations.

At this juncture, the DOL has invited public comment on the proposed regulations, which are available online at <http://www.dol.gov/esa/whd/>, until April 11, 2008.

In sum, the NDAA amendments to the FMLA create two types of leave that covered employers are required to provide. Employers should be aware of the expansion of their obligations under the FMLA and should revise their FMLA policies and procedures, if necessary, to include leave as provided by the NDAA amendments. If you have any questions regarding the FMLA, revisions to your policies or procedures, or any other employment related issue, please contact monica.velazquez@strasburger.com

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¹See DOL 2007 Statistics Fact Sheet, available at <http://www.dol.gov/esa/whd/statistics/200712.htm>.

² See DOL 2007 Statistics Fact Sheet, available at <http://www.dol.gov/esa/whd/statistics/200712.htm>.

³The term contingency operation is defined as a military operation in which members of the Armed Services may be called to action against an enemy of the United States.

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