Labor and Employment Bulletin

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Final Family and Medical Leave Act Rules Impose More Extensive Obligations on Employers

Background

The Final Rules fail to provide relief to employers.

The Family and Medical Leave Act of 1993 provides that employers who have 50 or more employees on the payroll have an obligation to provide up to 12 weeks of unpaid leave to eligible employees for the purpose of taking care of a newborn child, for caring for a sick relative or for the employee's own illness. The FMLA interim regulations, published by the Department of Labor in June 1993, established specific rules for employers and employees when dealing with family and medical leave issues. The interim regulations required, among other things, that employers post a notice to employees concerning their right to leave under the FMLA and notify employees in writing of the employer's policy on family and medical leave. Employers who violate the FMLA face liability for damages incurred by an employee, lost wages, liquidated damages and attorneys' fees.

The Final Rules

Following implementation of the interim regulations, the DOL accepted public comment on the problems in interpreting and administering the rules. The DOL then undertook major revisions to the regulations resulting in the FMLA Final Rules which became effective on April 6, 1995. The most significant revisions contained in the Final Rules are as follows:

1. The Final Rules adopt an expanded definition of a "serious health condition." Except for leaves related to child birth, an employee or an employee's relative must have a `serious health condition" to qualify for leave under the FMLA. The definition of "serious health

condition" has been revised to include chronic episodic conditions such as asthma, epilepsy and diabetes which might not require hospitalization or result in three continuous days of absence but nevertheless require ongoing medical treatment by a doctor. The Final Rules clarify that where an employee or sick relative misses work on an episodic basis because of a serious health condition, each episodic absence, even if less than three days, will be considered as FMLA qualifying leave. The Final Rules also establish that absences due to ongoing physical therapy or ongoing medical treatments such as chemotherapy, radiation treatment or dialysis are qualified FMLA leaves and should be counted against an employee's annual 12-week FMLA entitlement.

The Final Rules require the employer to designate FMLA leave within two business days of receiving notice of the FMLA qualifying event.

2. The Final Rules significantly expand the obligations of employers to promptly designate leave as FMLA qualifying after receiving notice from the employee of a need for medical or family leave. When an employer has sufficient information from the employee or the employee's representative of a need for medical or family leave, it has an obligation to designate such leave as FMLA qualifying within two business days of receiving notice of the FMLA qualifying event. A written confirmation of such designation must be sent to the employee before the next payday unless the next payday would occur less than a week after notification. In such event, the employer has until the second payday following the notice to designate leave as FMLA qualifying leave.

3. The Final Rules severely limit an employer's ability to retroactively designate leave as FMLA qualifying once an employee has returned from leave. Only where the employer did not have sufficient information to make the designation until after the employee has returned from leave may an employer retroactively designate leave as FMLA qualifying. Accordingly, it is imperative that an employer designate leave as FMLA qualifying as soon as it receives information that an employee is missing work for an FMLA qualifying reason. Absent such designation, the "clock" on an employee's 12-week FMLA entitlement will not begin to count down.

4. The Final Rules provide that if an employee has been offered a light duty assignment, the employee has the right to reject that assignment and take his or her full FMLA leave so long as he or she continues to have a serious health condition. The Final Rules do not forbid an employer's workers' compensation carrier from limiting or ending workers' compensation payments for refusal to take a light duty assignment.

5. The Final Rules establish that an employee has a right to restoration to either (a) the same position that he or she had prior to taking FMLA leave or (b) a "virtually identical" position upon return from Leave. "A virtually identical position" is defined as one that has substantially the same terms of employment, pay, benefits, position, responsibilities, duties and status as the employee's previous position.

6. The Final Rules allow an employer's health care provider to contact an employee's doctor

to "clarify" information contained in a medical certification. However, the employer's health care provider is prohibited from requesting additional information with regard to an employee's illness or injury.

7. The Final Rules require the employer to designate an FMLA measuring year for purposes of calculating its employees' 12-week FMLA entitlement. This year must be measured either on a calendar, anniversary, or rolling basis from the time the employee first went out on FMLA leave. If the employer fails to designate an FMLA measuring year, an employee must be given the most beneficial leave period available among the various provisions. This means that in those cases where an employer fails to designate a measuring year, it may be obliged to give up to 24 weeks of FMLA leave to employees for a qualified leave.

8. The Final Rules provide that when an employee or employer elects to substitute paid leave (of any type) for unpaid FMLA leave and the employer's procedural requirements (e.g., notice or certification requirements), for taking that kind of leave are less stringent than the FMLA requirements, only the less stringent requirements may be imposed. However, when accrued paid vacation or personal leave is substituted for unpaid FMLA leave for a serious health condition, an employee may be required to comply with any less stringent medical certification requirements of the employer's sick leave program.

IRS issues bulletin on the effect of FMLA on COBRA

On December 19, 1994, the Internal Revenue Service ("IRS") issued a bulletin to address questions about how the FMLA requirements affect an employer's obligation to provide COBRA continuation of health insurance coverage. The main points are as follows:

1. **The taking of leave under FMLA does not constitute a qualifying event under COBRA.** A qualifying event is an occurrence such as a termination of employment or reduction in hours which results in the loss of coverage under a group health plan.

2. A qualifying event occurs if (a) an employee, spouse or dependent child is covered on the day before FMLA leave begins or during the FMLA leave; (b) the employee does not return to employment at the end of the FMLA leave; and (c) there would be a loss of coverage in the absence of COBRA within the maximum coverage period, which is typically 18 months.

3. The qualifying event described in #2 occurs on the last day of FMLA leave.

4. A COBRA qualifying event can occur even if an employee failed to pay the employee's portion of the premium for health insurance coverage during the FMLA leave.

Eleven Easy Steps An Employer Can Take To Avoid Common FMLA Problems

The Department of Labor's FMLA Regulations are among the most complicated set of workplace rules ever implemented by the federal government. Because of the many procedural pitfalls, an unwary employer may inadvertently run afoul of the requirements of the Regulations even while granting an employee leave time. Fortunately, **most problems with administering the FMLA can be remedied by adoption of written FMLA policy and prompt notification to employees of their rights and obligations while on FMLA qualifying leave.** A discussion of eleven easy steps which an employer should take to avoid the most common FMLA problems follows.

1. **Does your company have a written FMLA policy? If so, has it been distributed to the employees?**

   An employer should have a written policy on FMLA leave which is distributed to employees either in an employee handbook or in a separate document. A written policy properly distributed gives employees notice of their rights and obligations under the FMLA, provides guidance for both employees and employers when dealing with FMLA issues and most importantly satisfies the requirements of the Final Rule.

2. **Have you posted the Department of Labor FMLA notice poster?**

   An employer has an obligation to post the Department of Labor's Notice of FMLA Rights poster in a prominent place in its work place. If it fails to do so, it may be subject to a fine of up to $100 and may lose its ability to discharge an employee who has exhausted his or her FMLA entitlement for any given year.

3. **Are you promptly sending employees written letters designating leave as FMLA qualifying leave?**

   The Final Rule requires all employers to designate an employee's absence for serious health conditions or for purposes of caring for a new child as FMLA qualifying leave in order to start the clock running on an employee's 12-week FMLA leave entitlement. This designation must be made promptly and verified in writing. If the employer fails to make such a designation, a qualified employee will have the right to take 12 weeks of FMLA leave in addition to any time which was taken prior to receiving written notification from the employer that the employee's leave counts against his or her annual leave entitlement. Accordingly, it is imperative that the employer's human resources department designate leave as FMLA qualifying as soon as possible after receiving notice that an employee is going out on leave because of a serious health condition or to take care of a new child. Accordingly, an employer should train its supervisors to notify human resources

immediately upon learning that an employee seeks leave or is out of work for an FMLA qualifying reason.

4. **Are you sending letters to employees who take FMLA leave which explain the Company's specific requirements on use of FMLA leave?**

An employer has a responsibility to notify employees who take FMLA leave of its specific requirements on taking FMLA leave, including those concerning (a) the employee's obligation to furnish medical certification of a need for leave; (b) the requirement that an employee exhaust accrued paid leave before unpaid leave; (c) the employee's right to substitute paid leave for unpaid leave; (d) any requirement that an employee make premium payments on health benefits; (e) any requirement for the employee to present a fitness for duty certificate upon return from leave; (f) the employee's status, if applicable, as a key employee; (g) the employee's right to restoration to the same or an equivalent job upon return from leave; and (h) the employee's potential liability for payment of health insurance premiums if he or she does not return from leave. If an employer fails to give written notice to employees of its specific requirements on use of FMLA leave, it may be barred from taking adverse action against the employee for failure to comply with those requirements.

5. **Are you designating workers compensation related absences as FMLA qualifying leave?**

The Final Rules establishes that worker's compensation absences generally qualify as FMLA leave. As such, an employer should designate time missed for worker's compensation injuries to start the clock running on any 12-week FMLA entitlement. If an employer fails to designate worker's compensation absences as FMLA qualifying, it may be required to give the employee 12 weeks of FMLA leave *in addition* to time missed as a result of a workers' compensation injury.

6. **Have you designated an FMLA measuring year?**

An employer must designate one of the three measuring year methods (calendar year, anniversary date, or rolling period measured from the date of the first FMLA leave). If an employer fails to designate a measuring year, it must give the employee the benefit of the best available measuring method when the employee goes out on leave. Consequently, a failure to properly designate a measuring year may result in an employee piggybacking two 12 week periods of leave where he or she might otherwise be entitled to only one 12 week period.

7. **Are you requiring employees to provide medical certification for serious health conditions?**

An employer's best control on abuse of medical leave is its ability to verify that an employee or an employee's relative has an FMLA qualified "serious health condition." Accordingly, an employer should uniformly require employees to provide medical certification of serious

health conditions and require the employee to provide the medical certification within 15 days of the employee's request for leave.

8. **Are you charging intermittent leave against an employee's 12-week FMLA entitlement?**

   All time missed as a result of a serious health condition, including time spent on ongoing physical therapy or medical treatments, even if taken on an intermittent basis for only a few hours each day or each week, is FMLA qualifying leave. This time should be charged against an employee's 12-week annual FMLA entitlement. The charge against the 12-week entitlement should be made based on the lowest normal measure of time used by the employer for pay purposes, typically in increments of an hour.

9. **Have you remembered your obligations under the Americans with Disabilities Act?**

   An employee returning from an FMLA leave related to his or her own serious health condition may be entitled to reasonable accommodation pursuant to the Americans With Disabilities Act ("ADA"). Consequently, even if an employee has completed an FMLA leave and returned to work, he or she may be entitled to a modification of the work schedule, work area, or even in some circumstances additional time off from work under the ADA.

10. **Does your Company make its bonus payments, if any, based on performance rather than attendance?**

    An employee who is out on FMLA leave who would otherwise qualify for an attendance or safety bonus but for the time missed while on an FMLA leave is entitled to receive any attendance-based or safety-bonus the employer awards to employees in similarly situated jobs. Bonuses based on performance-related criteria such as a certain level of sales, a certain number of claims processed or units produced, or the amount of value you have added to the company during the preceding year do not involve consideration of FMLA leave.

11. **Do you have less stringent procedural requirements for paid leaves than unpaid FMLA leave?**

    An employer which has less stringent notice or certification requirements than the FMLA for vacation, personal or sick leave and requires that paid leave be exhausted for FMLA leave, should provide in its FMLA policy that for any FMLA qualifying leave in which paid leave is used, the employee must meet the procedural requirements of the FMLA policy. Otherwise, employees may be entitled to the less stringent procedural requirements of the paid leave policy.

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