

THE EMPLOYER'S ADVISORY

A QUARTERLY NEWSLETTER

HIGHLIGHTING CURRENT EMPLOYMENT LAW ISSUES

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FMLA UPDATED

In January 2008, Congress amended the 15-year old Family and Medical Leave Act for the first time, adding a leave provision for military family members. Congress left it up to the Department of Labor (DOL) to interpret these amendments through rule making. On November 17, 2008, the DOL issued final rules interpreting the amendments and revising the old regulations in many significant ways. The final rule becomes effective January 16, 2009. The DOL website, www.dol.gov/esa, provides a copy of the full final rule, which should be mandatory reading for any HR Manager whose employer is covered by the FMLA (must have 50 or more employees). Although the final rule is not as entertaining as a fine Stephen King novel, with over 60 pages of fine print, you may find it both mysterious and frightening. Here are some of the more notable provisions under the final rule:

MILITARY FAMILY LEAVE. The final rule implements that Act's provision that eligible employees who are family members of covered service members may take up to 26 workweeks of leave in a single 12-month period to care for a covered service member with a serious illness or injury incurred in the line of active duty. "Family member" includes the service member's spouse, children, parents and next of kin. No other type of

FMLA leave grants leave rights to next of kin, and many of us do not know who is "next of kin." The final rule defines next-of-kin as the nearest blood relative other than spouse, child or parent and includes, in order of priority, the service member's blood relative guardian, sibling, grandparent, aunt or uncle, and finally, first cousin. The service member can prevent a family feud over which next-of-kin will care for him by simply designating a particular blood relative as his or her next of kin under the FMLA.

QUALIFYING EXIGENCY LEAVE. Under the amended FMLA, the reasons for a 12-week unpaid FMLA leave are expanded to allow an eligible employee whose spouse, parent or child is a service member serving in the National Guard or Reserves (not all members of the armed forces) leave for any "qualifying exigency" arising from the service member being on active duty or called to active duty. The final rule clarifies what constitutes a "qualifying exigency," which includes a short-notice deployment (7 days or less), military events and related activities, childcare and school activities, financial and legal arrangements, counseling, rest and recuperation, and post-deployment activities.

The final rule also includes two new DOL certification forms for employees using the military leaves. These are available on the DOL's website.

LIGHT DUTY. Recently, two federal courts determined that an employer may treat a period as FMLA leave where an employee is on light duty because the qualifying condition prevents the employee from performing the whole job. But under the final rule, the DOL states that time spent performing “light duty” work does not count against an employee’s FMLA leave entitlement and that the employee’s right to restoration is held in abeyance during this period of light duty (or until the end of the applicable 12-month FMLA leave year). So, explained a recent DOL publication, if an employee is voluntarily performing a light duty assignment, the employee is not on FMLA leave.

SERIOUS HEALTH CONDITION. The final rule maintains the six individual definitions of serious health condition, but the rule adds guidance on three of the definitions. The first concerns the current definition of serious health condition as “three consecutive calendar days of incapacity” plus “two visits to a health care provider.” Some courts took that to mean that the two visits must occur within the more-than-three-day period of incapacity. Under the final rule, the two visits must occur within 30 days of the beginning of the period of incapacity and the first visit to the health care provider must take place within seven days of the first day of incapacity.

A second way to establish serious health condition under the current regulations involves more than three consecutive, full calendar days of incapacity plus a regimen of continuing treatment. The final rule clarifies that the first visit to the health care provider must take place within seven days of the first day of incapacity.

Regarding the third type of serious health condition requiring periodic visits to a health care provider for chronic conditions, the final rule

defines “periodic visits” as at least two visits to a health care provider per year.

SUBSTITUTION OF PAID LEAVE. FMLA leave is unpaid. But the Act provides that employees may take, or employers may require employees to take, any accrued paid vacation or sick leave, as offered by their employer, concurrently with any FMLA leave. Under the final rule, all forms of paid leave offered by an employer will be treated the same, regardless of the type of leave substituted (including generic “paid time off”). An employee electing to use any type of paid leave concurrently with FMLA leave must follow the same terms and conditions of the employer’s policy that applies to other employees for the use of such leave. The employee is always entitled to unpaid FMLA leave if he or she does not meet the employer’s conditions for taking paid leave and the employer may waive any procedural requirements for the taking of any type of paid leave.

PERFECT ATTENDANCE AWARDS. The final rule changes the treatment of perfect attendance awards to allow employers to deny a “perfect attendance” award to an employee who does not have perfect attendance because of taking FMLA leave so long as the employer treats employees taking non-FMLA leave in an identical way.

MEDICAL CERTIFICATION PROCESS. The final rule addressed the difficulty in requesting, and receiving, medical certification for FMLA in conjunction with HIPAA protection. In the final rules, the DOL specifies that the employer’s representative contacting the health care provider must be a health care provider, human resource professional, a leave administrator, or a management official, but in no case may it be the employee’s direct supervisor. Further, employers may not ask health care providers for additional

information beyond that required by the certification form. In addition, the final rule specifies that if an employer deems a medical certification to be incomplete or insufficient, the employer must specify in writing what information is lacking, and give the employee seven calendar days to cure the deficiency. These changes will improve FMLA communications, protect the privacy of workers, and help ensure that the employees who need leave will get it and not be subject to repeated requests for additional information or be denied FMLA leave on a technicality.

Practical Tip: With the final rule going into effect on January 16, 2009, every employer covered by the FMLA should review their written policies and practices to determine if changes are needed.

NEW ADMINISTRATION LIKELY MEANS NEW UNION PROCEDURES

With the Democrats moving in to the White House and retaining their majority in both the Senate and the House of Representatives, passage of the Employee Free Choice Act and Respect Act is likely. These acts are definitely pro-union.

EMPLOYEE FREE CHOICE ACT. Currently, an employer can either voluntarily recognize a union that it believes represents a majority of the employees or the employer can demand a secret-ballot election conducted by the NLRB. Unions often try to demonstrate employee support by presenting the employer with union authorization cards signed by a majority of the group they seek to represent. Under the current law, once a union receives recognition, the parties must bargain in good faith for their first contract, but they are not obligated to reach an agreement.

The Employee Free Choice Act (EFCA) would change this long-standing system by providing automatic certification of a union solely on a showing of union authorization cards signed by the majority of the affected employees. And the employer would no longer have the option to demand a secret-ballot election. Additionally, the EFCA will require that if the parties are unable to agree on a contract within 90 days, a party may refer the dispute to the Federal Mediation and Conciliation Service (FMCS) for mediation. But if the FMCS cannot bring the parties to an agreement after 30 days of mediation, the dispute will be referred to arbitration, with both parties bound by the results of the arbitration for two years. Also, the EFCA will increase penalties against employers who commit unfair labor practices.

RESPECT ACT. Currently, the National Labor Relations Act distinguishes between supervisors and employees and affords employees the right to engage in union organizing and bargaining, and excludes supervisors from union organizing and bargaining. The NLRB currently defines supervisor as a person who assigns and responsibly directs duties and spends a regular and substantial portion of his or her time performing supervisory functions. The term “substantial” is at least 10 to 15 percent of the employee’s work time.

If passed into law, the proposed Respect Act would narrow the definition of “supervisor,” throwing many current supervisors into the bargaining unit. First, it would redefine “substantial” by requiring that a majority of the worker’s time be spent in supervisory functions. Next, it would strike both the “assign” and “responsibly to direct” functions from the definition of supervisor, allowing persons with these functions to be in the bargaining unit.

Supporters of the Act claim that the changes are needed in response to employers crafting job descriptions that exclude persons from coverage under the Act who are traditionally considered non-supervisors. Contrarily, opponents of the Act claim that the Respect Act ignores the original intent of the Act to exclude supervisors from union organizing and bargaining.

Practical Tip. If these proposals are signed into law, there will undoubtedly be an increase in union activity. So, employers should get ahead of the curve by educating their supervisors and managers now on spotting and appropriately responding to a union authorization card campaign.

ADD THE ADA TO THE LIST OF THINGS THAT GOT “BROADER” THIS HOLIDAY SEASON

On September 25, 2008, President Bush signed the Americans with Disabilities Act Amendments Act of 2008 (“Amendments Act”), which goes into effect January 1, 2009. In a nutshell, Congress was not pleased with how narrowly the courts construed the definition of “disabled” and made major changes to emphasize that “disability” should be interpreted broadly.

MAJOR LIFE ACTIVITIES. The Amendments Act broadens the definition of a “major life activity” and contains two lists of examples. While most of the activities listed have previously been recognized by the EEOC, a few new ones include reading, bending, and communicating. The Amendments Act also adds major bodily functions such as: functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

MITIGATING FACTORS. Perhaps the most significant change to the ADA’s definition of “disability” is that the use of mitigating measures, other than ordinary eyeglasses and contact lenses, may no longer be considered in assessing whether an individual has a disability. Similarly, an impairment that is episodic or in remission is now considered a disability so long as it would substantially limit a major life activity when active.

“SUBSTANTIALLY LIMITED.” The Amendments Act states that the Supreme Court has created an inappropriately high standard for coverage under the ADA, and focuses courts on whether covered entities have complied with their obligations, rather than whether an individual's impairment is a disability.

REGARDED AS. Finally, the Amendments Act clarifies what it means to be “regarded as” disabled under the ADA. It states that any individual subjected to an action prohibited under the ADA as a result of an actual or perceived impairment will meet the test, but excludes any impairment that has an actual or expected duration of 6 months or less. In addition, the Amendments Act states that individuals who are “regarded as” disabled are not entitled to reasonable accommodations.

NEW STATUTORY LEAVES

Courtesy of the Colorado Legislature, certain employees are now entitled to two additional statutory leaves: 1) members of the civil air patrol that are called to duty for a civil air patrol mission; and 2) qualified volunteers who are needed to assist in a disaster. Both statutes give specific instructions for how employers should treat these leaves and the instructions differ in a few respects depending on whether the employer is public or private.

CIVIL AIR PATROL MISSION LEAVE.

Effective August 5, 2008, any employee, other than a temporary employee, who is a member of the civil air patrol and is called to duty for a civil air patrol mission is entitled to a leave of absence, for up to fifteen days in a calendar year, for the time the employee is engaged in the civil air patrol mission. *See* C.R.S. 28-1-104 (public employers) and 28-1-105 (private employers). But the leave is only allowed if the employee “satisfactorily performs” his or her service. Such satisfactory performance is presumed if you’re a public employee, while private employees must provide evidence that their service was performed satisfactorily. Also, employees using such leave must return to employment as soon as practicable after being relieved from service. This leave is paid for public employees, but unpaid for private employees. In both circumstances, the leave may not affect the employee's rights to vacation, sick leave, bonus, advancement, or other employment benefits normally to be expected for the employee’s particular employment. Public employees must be returned to their same position, while private employees must be returned to the same, or similar position upon their return.

Additional Note: In addition to the prohibition against hindering or preventing a member of the civil air patrol from taking leave as discussed above, employers are also prohibited from discriminating against or discharging from employment any member of the civil air patrol on the basis of such membership. So, employers must ensure that their hiring, firing and disciplinary actions are in no way based on an employee’s membership in the civil air patrol.

EMERGENCY VOLUNTEER SERVICE LEAVE. Similarly, also effective August 5, 2008, any employee who is a “qualified volunteer” called to service by a “volunteer organization” for the purpose of assisting in a “disaster” as these terms are defined by C.R.S. §24-32-2202 through §24-

32-222, is entitled to a leave of absence not to exceed fifteen work days in a calendar year. Like the leave provided for Civil Air Patrol Missions, the leave for public employees must be paid, while the leave for private employees is without pay. Also, this leave may not affect an employee’s rights to other paid leaves, bonuses, advancement, or other employment benefits or advantages relating to and normally to be expected for the employee’s particular employment.

In order to be eligible for this leave, private employees must provide proof that they are qualified volunteers. Public employees, on the other hand, are only entitled to leave if the volunteer service was satisfactorily performed, although this is presumed unless the employer can prove it was not. Leave is allowed only if the employee returns to his or her job as soon as practicable after being relieved from Emergency Volunteer Service. Public employees must be returned to their same position, while private employees must be returned to the same, or similar position upon their return.

There are certain employees who are not eligible for this leave. Temporary employees employed by a private employer; employees who are “essential” and whose absence would likely cause the employer to suffer economic injury; employees whose duties include assisting in disaster recovery; and any employee if granting the leave would result in more than 20% of an employer’s employees being on Emergency Volunteer Service Leave on any work day.

**NOTICE –
EFFECTIVE JANUARY 1, 2009**

The minimum wage in Colorado will increase to \$7.28 per hour and the tip credit will remain at \$3.02 per hour.

Q & A

Q. On December 31 every year, we give employees who had perfect attendance that year a bonus of \$500. John missed two months of work in 2008 because he was on FMLA leave; but he was not absent for any other reason. Do we have to give him the attendance bonus?

A. Yes. Under the existing FMLA regulations, an attendance bonus can not be denied because of FMLA leave. However, the answer to this question will change in 2009 for any FMLA leave taken after January 15, 2009. The new final rule provides that FMLA can be counted against an attendance bonus so long as employees taking non-FMLA leave would also be denied the bonus. This rule should not be applied to FMLA absences that occur before January 16, 2009.

Q. Are employers in Colorado required to verify on-line that new hires are eligible to work in the United States, or is it sufficient to complete the I-9 form, and the Colorado Affirmation form?

A. Currently, only Colorado employers who have service contracts with public entities are required to use the on-line verification system to affirm that new employees are authorized to work in the U.S. This system is called E-Verify and is administered by the Department of Homeland Security. But effective January 15, 2009, new federal regulations require federal contractors to use E-Verify for all new hires and existing employees who perform direct work on a covered federal contract. Any employer can elect to use E-Verify for verifying new employees' legal status by entering into a Memorandum of Understanding with DHS.

More information on E-Verify is available at www.uscis.gov/portal/site/uscis .

Q. We own a farm and raise various crops. Do we have to pay minimum wage and overtime to our farm hands?

A. Agricultural workers are generally not entitled to overtime under the FLSA. Nevertheless, they are entitled to receive minimum wage for every hour worked, unless their employer is very small and did not use more than 500 man-days of labor during any quarter in the prior calendar year. A "man-day" is any day an agricultural employee works for at least one hour. A spouse, child or immediate family member who works for the farmer is not counted when computing man-days. As a rule of thumb, you can employ up to 5 non-family employees 7 days a week during the quarter without exceeding the 500 man-day rule. 29 USC §§203, 213.

Q. When Christmas is over, there are 15 employees we intend to layoff because of the economic downturn. Are we required to give them notice in advance that they will be laid off? Do we have to pay any severance pay?

A. Neither Colorado law nor Federal law require that an employer pay severance pay. Unless you previously promised these employees severance pay at the time of a layoff, there is no payment obligation. Regarding prior notice, if you employ less than 100 employees, the WARN Act does not apply to your business, and you have no obligation under Colorado or Federal law to give advance notice of the layoff. Again, this assumes that you made no promises to employees of prior notice before a layoff. Promises can create legal obligations.