Further FMLA Amendments AND New EEOC Poster Keep Employers On Their Toes

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2009 has proven to be a banner year for employers, who have had to stay on their toes to keep up with constantly changing laws and regulations. Although the pace has slowed, employers should be aware of two new important developments as the year winds down.

**Family And Medical Leave Act Amendments**

On October 28, 2009, President Obama signed into law the Fiscal Year 2010 National Defense Authorization Act, which included two important amendments expanding the scope of Family and Medical Leave Act (“FMLA”) as it relates to military families. When FMLA was amended in 2008 to provide for “exigency leave” for military families, such leave was only available when members of the National Guard or other Reserve components were called up to active duty. As amended, FMLA now provides for 12 weeks of FMLA leave for active duty service members and removes the requirement that duty be in support of a “contingency operation.” The second amendment extends the 26 weeks of leave permitted to care for family members injured while serving on active military duty to include veterans who are undergoing medical treatment, recuperation or therapy for serious injury or illness that occurred in the five years preceding the date of treatment. These provisions are effective immediately upon enactment.

The amendments also revise the definition of “serious injury or illness” for active duty service members and provide a definition relating to veterans. Both definitions now include an injury or illness that existed *before* the beginning of the member’s active duty that was aggravated by service in the line of duty on active duty in the Armed Forces. For veterans, the definition further adds that the injury or illness may manifest itself before or after the member became a veteran.

Because of these changes, employers will once again need to revise their FMLA policies, and may need to change some of their notice and/or certification forms to take into account the new changes. The Department of Labor has not yet announced whether it will be issuing revised forms for such purposes.

**Equal Employment Opportunity Commission Poster Revised**
On October 22, 2009 the Equal Employment Opportunity Commission (EEOC) announced that it had updated its workplace notice to reflect the requirements of the new Genetic Information Nondiscrimination Act ("GINA"), which takes effect November 21, 2009, and the changes made to the Americans with Disabilities Act that were effective January 1, 2009. For federal contractors, the poster also updates the Office of Federal Contract Compliance Programs required posting by adding new information about veteran status and a new section on retaliation.

Employers can meet their obligation under the law by downloading a supplement to the current “EEO is the Law” poster and posting it alongside the 2002 edition of the poster, or they may download or order the new November 2009 form in its entirety. Information about obtaining copies of the forms can be accessed at http://www.eeoc.gov/posterform.html.

**Reminder – Flexible Leave Act**

Finally, a reminder to employers who are updating and amending handbooks and policies: important changes were made earlier this year to the Maryland Flexible Leave Act ("FLA") to clarify some of the most troubling ambiguities in the law. Employer policies should reflect the following definitions in the FLA:

- An “employee” must be primarily employed in the State of Maryland;
- An “immediate family member” is limited to the child, spouse, or parent of the employee;
- A “child” is an adopted, biological, or foster child, a stepchild, or a legal ward who is: (1) under the age of 18, or (2) over 18 and incapable of self-care due to a mental or physical disability;
- A “parent” is an adoptive, biological, or foster parent, a stepparent, a legal guardian, or a person fulfilling a parental role ("standing in loco parentis")
- “Leave with pay” is paid time that is “earned and available” to the employee based on hours worked, or as an annual grant of a fixed number of hours or days of leave (so an employee must not only have “earned” the leave, but it must be “available” to take under the circumstances); and
- “Leave with pay” does not include benefits provided under ERISA plans, insurance benefits (including self-insured plans), workers’ compensation benefits, unemployment compensation and disability benefits.
In addition, employers may deny leave to employees who fail to follow notice or call-in procedures. Importantly, employers should note that the amendments to the FLA state that the purpose of the Act is to “allow an employee of an employer to use leave with pay to care for an immediate family member who is ill under the same conditions and policy rules that would apply if the employee took leave for the employee’s own illness” (emphasis supplied). This language appears to address common complaints by employers utilizing no-fault leave policies that employers could not count leave under the FLA as an “occurrence” even if the leave would have been counted as such for the employee’s own illness.

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