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Employers –Take Heed of New Leave Laws: New FMLA Regulations Issued By The U.S. Department of Labor; D.C. Sick And Safe Leave Act Also Takes Effect

As the country prepares for a change in administration, employers need to prepare to comply with the changes to various laws regulating the workplace including leave laws such as the FMLA and the D.C. Sick and Safe Leave Act.

The Department Of Labor Issues FMLA Regulations

On November 17, 2008, the Department of Labor ("DOL") published final regulations applicable to the Family and Medical Leave Act ("FMLA"). The final regulations, which take effect on January 16, 2009, address the recent statutory amendments to the FMLA to provide for military family leave and contain numerous revisions to the existing federal regulations that establish what employers and employees must do in order to comply with the FMLA.

New Regulations Pertaining To Military Family Leave

The National Defense Authorization Act of 2008, which was signed into law by President Bush on January 28, 2008, amended the FMLA to provide military caregiver leave and qualifying exigency leave.

Military caregiver leave permits an eligible employee who is a spouse, son, daughter, parent, or next of kin of a covered service member to take up to 26 workweeks of FMLA leave in a single twelve-month period to care for the service member who became seriously ill or injured while on active duty. The regulations clarify that the 26-workweek leave entitlement is to be applied as a per-service member, per-injury entitlement. Thus, an eligible employee may take 26 workweeks of leave to care for one covered service member in a 12-month period and then take another 26 workweeks of leave in a different 12-month period to care for another covered service member or the same covered service member with a subsequent serious illness or injury. Employers do not have the option of choosing how the 12-month period is calculated, as they do with other forms of FMLA leave, but rather, the regulations provide that the 12-month period begins when the employee starts taking military caregiver leave.

Qualifying exigency leave permits an eligible employee to take up to 12 weeks of FMLA leave in a twelve-month period because of 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." The regulations define "qualifying exigency" to include: (1) short-notice deployment; (2) military events and related activities; (3) childcare and school activities; (4) financial and legal arrangements; (5) counseling; (6) rest and recuperation; (7) post-deployment activities; and (8) additional activities where agreed to by the employer and the employee.

Changes To The Existing FMLA Regulations

In response to the Supreme Court's decision in *Ragsdale v. Wolverine World Wide Inc*., 535 U.S. 81 (2002), which invalidated categorical penalties for notification violations, the final regulations provide that an employer may be liable for notification violations if an employee suffers an individualized harm. Among other changes made to the existing FMLA regulations are:

- ***Definition of "Serious Health Condition" Strengthened Slightly -*** The final regulations create a somewhat stricter definition of what constitutes a "serious health condition" covered by the FMLA. Although the final regulations retain the six individual definitions of what constitutes a "serious health condition," they modify several of the definitions by adding requirements regarding visits to health care providers. For example, for a "serious health condition" consisting of a period of incapacity for more than three consecutive days with at least two treatments from a healthcare provider, the final regulations require that the two treatments occur within 30 days of the beginning of the period of incapacity and that the first visit occur within 7 days of the beginning of the period of incapacity. Similarly, for a "serious health condition" consisting of a period of incapacity for more than three consecutive days with treatment once by a health care provider followed by a regimen of continuing treatment, the final regulations require that the visit to the health care provider occur within 7 days of the beginning of the period of incapacity. In addition, for a "serious health condition" consisting of any period of incapacity for a chronic serious health condition, the final regulations require that the employee make at least two visits to a health care provider per year.
- ***Employer Notice Requirements Consolidated -*** The final regulations consolidate all employer notice requirements into one section of the regulations in order to reconcile certain conflicting provisions and time limitations. Employers must provide employees with a general notice about the FMLA, an eligibility notice, a notice of rights and responsibilities, and a designation notice. Employers will now have five, not two, business days to provides these required notices.
- ***Employee Notice Requirements Stricter -*** Currently, employees have up to two business days after an absence to notify their employer of the need for FMLA leave. The final regulations require an employee to follow the employer's normal call-in procedures for reporting an absence, unless unusual circumstances prevent the employee from doing so.

- ***Medical Certification Requirements -*** The final regulations require an employer who views a medical certification as incomplete or insufficient to notify the employee in writing, specify what information is missing, and given the employee seven calendar days to provide additional information. In addition, the final regulations detail the time periods applicable to recertifications.

- ***Direct Contact With The Employee's Healthcare Provider Permitted -*** The final regulations permit direct contact between the employer and the employee's health care provider for purposes of clarifying the employee's medical certification form, provided that such contact meets the requirements of applicable federal health privacy laws. Thus, the contact may be made by a health care provider, a human resources professional, or a management official, but not the employee's direct supervisor.

- ***Settlement of FMLA Claims -*** The final regulations make it clear that employers may settle FMLA claims without first obtaining the approval of the DOL or a court. Prospective waivers of FMLA rights, however, remain prohibited.

- ***Light Duty Does Not Count As FMLA -*** The final regulations clarify that time spent in "light duty" work does not count against an employee's FMLA leave entitlement and that the employee's right to job restoration is held in abeyance during the period of light duty or until the end of the applicable 12-month period.

The full-text of the final regulations published by the DOL can be accessed at http://www.dol.gov/esa/whd/fmla/finalrule.pdf.

The D.C. Sick And Safe Leave Act Takes Effect

On November 13, 2008, the District of Columbia Accrued Sick and Safe Leave Act of 2008 ("ASSLA") took effect, making Washington, D.C. the second city in the United States to require employers to provide paid sick leave to employees.

Under ASSLA, employees in the District will accrue paid sick leave for hours worked at varying rates depending on the size of the employer. For employers with 100 or more employees, eligible employees will accrue one hour of paid sick or safe leave per every 37 hours worked, which equates to 7 calendar days per year for full-time employees. For employees with 25 to 99 employees, eligible employees will accrue one hour of paid sick or safe leave per every 43 hours worked, which equates to 5 calendar days per year for full-time employees. For employees with 24 or fewer employees, eligible employees will accrue one hour of paid sick or safe leave per every 87 hours worked, which equates to 3 calendar days per year for full-time employees. ASSLA does not apply to independent contractors, health care workers who choose to participate in a premium pay program, and wait staff.

A review of the ASSLA reveals at least a couple of open questions. First, it is unclear whether the size of the employer is based only on the number of employees working in the District of Columbia or on the employer's total number of employees. Second, it is unclear when employees actually become eligible for leave. The ASSLA incorporates the definition of employee used in the D.C. FMLA, which defines an employee as having been employed by the same employer for at least 12 months without a break in service and have worked for at least 1,000 hours (an average of 19 hours per week) during the 12-month period immediately preceding the requested leave. A different provision of the ASSLA, however, provides that individuals accrue paid sick and safe leave upon the beginning of employment and may take accrued leave after 90 days of service with the employer. These questions are likely to be addressed when the D.C. Office of Employment Services issues regulations implementing the ASSLA.

Statutory sick and safe leave may be used for:

- Absence due to physical or mental illness, injury or medical condition of the employee;

- Absence while the employee obtains professional medical diagnosis, care or preventative medial care;

- Absence while caring for a child, parent, spouse, domestic partner or any other family member needing care described above; and

- Absence where employee or employee's family member is a victim of stalking, domestic violence, sexual violence, if absence is directly related to seeking social, or legal services pertaining to stalking, domestic violence or sexual violence.

Unused paid sick or safe leave is carried over from year to year but an employee cannot use more than the annual accrual in a given year unless the employer agrees otherwise. Paid sick or safe leave does not have to be paid to an employee upon either voluntary or involuntary termination of employment.

The Act imposes notice obligations on both employers and employees. In particular, an employer must post a notice of rights under the ASSLA in a conspicuous place once such a notice is prepared by the Mayor. To the extent possible, an employee needs to give the employer at least 10 days advance notice of the intent to use paid sick or safe leave. Where notice is not possible, the employee may provide an oral request prior to the start of the work shift for which the paid leave is requested. In the case of an emergency, the employer is to be notified prior to the start of the next work shift or within 24 hours of the onset of the emergency, whichever occurs sooner. An employer may request "reasonable" certification for any use of paid sick or safe leave exceeding 3 consecutive days.

An employer with a paid leave policy providing options such as paid-time off or universal leave is not required to modify the policy if the policy offers an employee the option, at the employee's discretion, to accrue and use leave under terms and conditions that are at least as equivalent to the paid leave available under the ASSLA. The ASSLA does not change any obligation of an employer subject to an existing contract, collective bargaining agreement or employment benefit program that provides greater paid leave rights to employees than those provided under the ASSLA.

The ASSLA prohibits an employer from discouraging an employee from using the paid sick or safe leave or retaliating against the employee for using paid sick or safe leave. Offenses are subject to fines ranging from $500 to $1,000 per offense.

Recommendations

Employers covered by the FMLA and/or the D.C. Sick and Safe Leave Act should revise their policies, procedures, forms, and documents to reflect these changes and ensure compliance. Employers should also train managers and supervisors regarding these changes and new leave requirements. Venable has developed model policies to address each of these laws and stands ready to assist clients in dealing with these important human resource developments.

Venable's Upcoming Client Webinar On More Big Changes Coming To Labor And Employment Law

There is a broad consensus that major changes are coming to many aspects of labor and employment law in the newly elected Obama administration. Venable attorneys have been actively monitoring recent developments and their likely impact on employers of all sizes and industries. We will share our knowledge with interested employers in a nationwide webinar to be held on **December 16, 2008**. Those interested in attending Venable's webinar should register with Angela Brown at ambrown@Venable.com.

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