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RECENT FMLA DEVELOPMENTS: The National Defense Authorization Act of 2008, the Proposed FMLA Regulations, and a Brief Primer on the EEOC's Guidelines Concerning Caregivers

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Scope of FMLA

- 95.8 million workers in workplaces covered by FMLA regulations
- 77.1 million workers who met eligibility requirements
- 7.0 million workers took FMLA leave in 2005
- 1.7 million workers took intermittent FMLA leave in 2005



Recent FMLA Developments

- The National Defense Authorization Act of 2008
- Proposed FMLA Regulations
- Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities (indirectly related to FMLA)



FMLA Basics

Employees may take 12 weeks of FMLA leave in a 12 month period if:

- the employee has worked for the employer for 12 months; and
- the employee worked 1,250 hours in the past 12 months; and



FMLA Basics

Employees may take 12 weeks of FMLA leave in a 12 month period if: (continued)

- the employee's need for leave is for a FMLA qualifying reason; and
- the employee works for a FMLA-covered employer at a FMLA-covered worksite



FMLA Basics

A FMLA-covered employer is one that has at least 50 employees within a 75 mile radius



FMLA Basics

FMLA qualifying reasons include:

- birth, adoption, or placement of a child in the employee's home for foster care; or
- the employee needs to care for a spouse, parent or child with a "serious health condition"; or
- the employee cannot work because of a "serious health condition"



NDAA Amendment to FMLA

There are two new categories of FMLA leave

- leave to care for a family member who served in the armed forces; and
- “qualifying exigency” leave arising out of the active duty of a family member



NDAA Amendment to FMLA Leave to Care for Family Member

Who can take NDAA Family Member leave?

- Spouse, son, daughter, parent, or next of kin (nearest blood relative) of a member of the Armed Services if:
 - the Armed Services member has a serious injury or illness and
 - is undergoing medical treatment, recuperation, therapy, in outpatient status or on temporary disability list for a *serious injury or illness*



NDAA Amendment to FMLA Leave to Care for Family Member

- *Serious injury or illness*: an injury or illness incurred on active duty in the armed forces that may render the person medically unfit to perform the duties of his or her office, grade, rank or rating



NDAA Amendment to FMLA Leave to Care for Family Member

How much NDAA Family Member leave is available and how can it be taken?

- 26 weeks leave, but one time entitlement
- to be taken during a single 12 month period
- If combined with other FMLA leave, period may not exceed 26 weeks (no tacking on)



NDAA Amendment to FMLA Leave to Care for Family Member

When does the NDAA Family Member
leave requirement go into effect?

IT IS ALREADY IN EFFECT!!



NDAA Amendment to FMLA Qualifying Exigency Leave

What is Qualifying Exigency Leave?

- Leave for any qualifying exigency needed because the employee's spouse, son, daughter, or parent is on active duty (or is being called to active duty) in the Armed Forces in support of a contingency operation



NDAA Amendment to FMLA Qualifying Exigency Leave

How much qualifying exigency leave may an employee take and how can the employee take it?

- 12 weeks of leave in a 12 month period
- qualifying exigency leave is simply another form of FMLA leave, and does NOT create an additional 12 week leave entitlement



NDAA Amendment to FMLA Qualifying Exigency Leave

How much qualifying exigency leave may an employee take and how can the employee take it? (continued)

- May be taken intermittently
- Does not apply to next of kin



NDAA Amendment to FMLA Qualifying Exigency Leave

- “Qualifying exigency” and “contingency operation” are not defined Secretary of Labor is to issue regulations
- Not in effect until regulations are issued
- DOL has urged employers to implement this leave policy before it becomes effective



FMLA v. USERRA

- USERRA grants leave to the service member
- FMLA grants leave to the service member's family



Proposed FMLA Regulations

- 125 pages of 9 point font
- Most of the regulations have been revised, but some revisions are just reorganization and clarification
- This presentation highlights only some of the revisions



Proposed FMLA Regulations

- Eligibility
 - Clarifies that 12 month period does not need to be consecutive, but “look back” limited to 5 years



Proposed FMLA Regulations

- Health conditions
 - For “serious health condition”, the two visits to a health care provider must occur within 30 days of the incapacity
 - “Periodic visits” to a healthcare provider require 2 visits per year
 - Common ailments (flu, colds) can be covered if other requirements are met



Proposed FMLA Regulations

- Notice provisions
 - Consolidated into one section
 - More detailed notice required by employers
 - Extends deadline to send out eligibility and designation notices from 2 to 5 business days
 - Employee needing FMLA leave must comply with usual and customary call-in procedures except in unusual circumstances



Proposed FMLA Regulations

- Notice provisions
 - Employees can request FMLA leave by stating:
 - They can't perform the functions of the job or that a covered family member is unable to participate in regular daily activities
 - The anticipated duration of the absence
 - Whether they (or a family member) intend to visit a health care provider or are receiving continuing treatment
 - NOT enough to call in sick without explanation



Proposed FMLA Regulations

- Medical Certifications
 - If they are insufficient or deficient, the employer can require an employee to cure the problems within 7 days
 - If not cured, employers may (1) contact the medical provider directly and ask for clarification (HIPAA compliance is required); or (2) authenticate the certification
 - New form for Medical Certification



Proposed FMLA Regulations

- Medical Certification/Fitness for Duty
 - If employer's notice of eligibility requires a fitness-for-duty medical certification with a list of the essential functions of the job, the employee's health care provider must use the list in determining the employee's fitness for duty



Proposed FMLA Regulations

- Settlement
 - Permits employers and employees to settle and waive past FMLA claims, but can't waive future FMLA rights



Proposed FMLA Regulations

- Light duty work
 - Does not qualify as FMLA leave nor count as FMLA leave



Proposed FMLA Regulations

- Insurance

- Employers have an obligation to make sure that employee health insurance is reinstated if it lapses during FMLA leave.
- If the employer does not meet this obligation, it is responsible for all medical costs



Caregiver Guidelines

Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities issued by EEOC in May, 2007

- Premise of the Caregiver Guidelines:
 - As caregivers, women face forms of discrimination that amount to sex discrimination.
 - Caregivers face discrimination based on other characteristics protected by law, such as race, religion, national origin.



Caregiver Guidelines

The Caregiver Guidelines encourage employers to “adopt best practices to make it easier for all workers, whether male or female, to balance work and personal responsibilities” and eliminate the maternal wall or “glass ceiling” that prevents many women from advancing in their careers.”



Caregiver Guidelines

The Caregiver Guidelines acknowledge that an individual's status as a "caregiver" is not protected by law, but . . .



Caregiver Guidelines

The Caregiver Guidelines and the overly-simplistic hypotheticals in them show:

- EEOC intends to interpret Title VII and other laws expansively to protect caregivers;
- EEOC will scrutinize disparate treatment and, where possible, attribute it to a protected characteristic
- Disparate treatment based on a protected characteristic is illegal discrimination



Caregiver Guidelines

Lesson for employers:

- Make sure that leave and absence policies are enforced uniformly to avoid claims of disparate treatment
- Make sure supervisors are properly trained on leave and absence policies



Caregiver Guidelines

Lesson for employers: (continued)

- Make sure any disparate treatment is based on permissible factors that (hopefully) can be objectively proven
- Where possible, make sure that records such as performance evaluations and attendance records show that disparate treatment is based on permissible factors



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