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EMPLOYMENT BILLBOARD

VOLUME 1 ISSUE 1 WINTER/SPRING 2009

CONTENTS

FAMILY & MEDICAL LEAVE ACT ("FMLA")

The U.S. Department of Labor has released new regulations for the application and enforcement of the Family & Medical Leave Act. These changes were announced November 14, 2008 with an effective date of January 16, 2009. These new regulations will be formally published at 29 C.F.R. pt. 825 incorporating the new FMLA amendments relating to leave for family members assisting an injured or deploying service member. In addition, these new regulations will address concerns that have been raised in the past regarding the types of treatment required to trigger "serious health condition" certification, notice requirements, and employers contacting healthcare providers. Highlights from the new regulations are as follows:

Military Amendments

The new military leave amendments entitle the "next of kin" of service members, with a serious illness or injury incurred in the line of duty, to take up to 26 weeks of leave in a single 12 month period to care for the injured service member. The use of a rolling 12 month period that begins when an employee starts using this "military caregiver" leave is required by the regulations. An employer accounting for leave under this method is specifically restricted.

"Next of Kin" encompasses a much broader range of individuals who are FMLA eligible when providing care or support for covered service members than traditional FMLA provisions. The term specifically includes any blood relatives granted legal custody, siblings, grandparents, aunts and uncles, first cousins, and children age 18 and older.

The regulations also detail the requirements to provide leave because of a "qualifying exigency" resulting from a covered service members call to active duty status. FMLA covered events include absences to arrange for childcare or school activities, to make financial and legal arrangements, to attend counseling, to attend arrival ceremonies, reintegration briefings and events sponsored by the military for ninety days after the termination of military status, and any other activities arising out of the active duty status.

Definitions

The FMLA provides several definitions for a "serious health condition" that would provide protection under the Act. The new regulations describe a specified regimen of care for the medical treatment required to trigger these protections. Where the employee is qualifying for the FMLA based on three consecutive days of incapacity plus two visits to a healthcare provider, the two visits must occur within thirty days of the start of the period of incapacity, and the first visit must occur within seven days of the start of incapacity. Where the employee is qualifying for the FMLA based on continuing regimen of treatment, the first visit must take place within seven days of the start of incapacity. Where the qualifying leave is based on "chronic serious health condition", the new regulations require at least two visits to a healthcare provider per year.

Designation of FMLA Leave and Fitness for Duty Certification

The new regulations give employers five business days to provide employees with the required FMLA notices, including an eligibility notice, and a designation notice. Employees are now required to comply with their employers' usual procedures for reporting an absence, unless unusual circumstances prevent timely notice.

The new regulations remove language that was invalidated by the Supreme Court in the Ragsdale decision in 2002. Under the old standard, an employer who failed to properly designate FMLA leave was prohibited from counting time off against the FMLA allowed twelve weeks of leave, even when it resulted in the employee receiving more than twelve weeks. Now, employers may be liable for FMLA violations when their failure to follow notification rules causes actual monetary or benefits loss. Employees may also receive specific relief tailored to any injury they sustain, including reinstatement. A number of other matters are addressed in the final regulations, from intermittent leave, substitution of paid leave, and employer notice requirements, to joint employer issues. Because of the many changes, human resource representatives will want to review and familiarize themselves with the new regulations.

FAMILY & MEDICAL LEAVE ACT ("FMLA") CONT'D

Substitution of Paid Leave
All FMLA leave is unpaid. However, the statute provides that employees may take, or employers may require employees to take, any accrued paid vacation, personal, family or medical or sick leave, as offered by their employer, concurrently with any FMLA leave. This is called the "substitution of paid 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 apply to other employees for the use of such leave. An employee will always be entitled to unpaid FMLA leave even if s/he 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."

Americans with Disabilities Act (ADA) Amendments of 2008 Act of 2008

Effective January 1, 2009

The President signed the Americans with Disabilities Act Amendments Act of 2008 ("ADA AA" or "Act"). The Act makes important changes to the definition of the term "disability" by rejecting the holdings in several Supreme Court decisions and portions of Equal Employment Opportunity Commission's ADA regulations. The Act retains the ADA's basic definition of "disability" as an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment. However, it changes the way these statutory terms should be interpreted in several ways.

Most significantly, the Act:

- Directs EEOC to revise that portion of its regulations defining the term "substantially limits";
- Expands definition of "major life activities" by including two non-exhaustive lists; (1) the first list includes many activities (e.g., walking) as well as activities that EEOC has not specifically recognized (e.g., reading, bending, communicating); (2) the second list includes major bodily functions (e.g. "functions of the immune system, normal cell growth, digestive");
- states that mitigating measures other than "ordinary eyeglasses or contact lenses" shall not be considered in assessing whether an individual has a disability;
- clarifies that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active;
- Provides that an individual subjected to an action prohibited by the ADA (e.g. failure to hire) because of an actual or perceived impairment will meet the "regarded as" definition of disability, unless the impairment is transitory and minor;
- Provides that individuals covered only under the "regarded as" prong are not entitled to reasonable accommodation; and
- emphasizes that the definition of "disability" should be interpreted broadly.

The EEOC is evaluating the impact of these changes on its enforcement guidances.

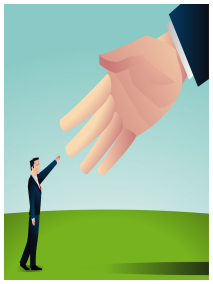
The Employment Situation

As of the end of December, 2008, the Bureau of Labor Statistics has reported a 7.2% unemployment rate. In the current environment, no industry has been left unaffected with job losses reported widespread across all major sectors. These facts leave more and more employers facing unpleasant workforce reductions. These employment actions have an emotional and economic impact on employees that require the observance of a myriad of complex laws, and a large amount of work to properly plan and execute.

Thoughtful planning can ensure compliance with the applicable laws and take some of the "sting" out of this employment action. However, before considering a workforce reduction, alternative methods, can be pursued through less radical means, including:

- Reducing or freezing compensation;
- Prohibiting overtime;
- A freeze on hiring;
- Eliminating incentive programs

Assuming the above measures have been exhausted and a workforce reduction is the only alternative, make this action as painless as possible for everyone involved by allowing sufficient time for planning and execution. Make sure to involve individuals who have experience in workforce reduction strategies and practices. Sufficient planning and effective partnering with experienced counsel will produce the best result, placing you in a position to anticipate and favorably resolve potential litigation.



If your company finds itself in a situation where a reduction if workforce is eminent, you will want to be especially mindful of the federal Warn Act, along with the various state's mini-Warn Act requirements. The Law Office of Bill. R. Johnson, PLLC is ready to assist you in this effort and with any other employment related issue.

BILL BULLETIN

The Arbitration Fairness Act of 2009

Bill (H.R. 1020) has been introduced to both houses of Congress that basically eliminates an employer's right to enter into pre-dispute arbitration agreements with its employees. Under the proposed Arbitration Fairness Act of 2009, no pre-dispute arbitration agreement shall be valid or enforceable if it requires arbitration of: (1) an employment, consumer, or franchise dispute, or (2) a dispute arising under any statute intended to protect civil rights. Further, the Arbitration Fairness Act declares that the validity or enforceability of an agreement to arbitrate shall be determined by a court, under federal law, instead of an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement. Arbitration provisions in collective bargaining agreements are exempt.

Status: *As of March 16, 2009, the Bill has been referred to the Subcommittee on Commercial and Administrative Law.*

11811 North Freeway, Suite 500
Houston, Texas 77060
Phone: 832-487-8612
Fax: 866-207-2597
E-mail: bill.johnson@brjlawffirm.com

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