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Employment Update

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Department of Labor Announces New Proposed FMLA Regulations

BY JENNIFER CRAIGHEAD AND DAVID FREEDMAN

The U.S. Department of Labor (DOL) recently proposed new regulations regarding the Family and Medical Leave Act (FMLA), a federal law that provides up to 12 weeks of annual unpaid leave to eligible employees for the placement of a child for adoption or foster care, to care for a newborn child, to care for a close family member with a serious health condition, or when the employee is unable to work due to the employee's own serious health condition. DOL's 477-page proposal is intended to provide clarification regarding a number of topics, including the following highlights:

- The definition of a "serious health condition"
- The medical certification process
- Use of intermittent leave
- How to count holidays
- FMLA waivers and settlements
- Penalties for failure to give notice
- New military leave provisions

You may submit comments about the proposed regulatory changes electronically at www.regulations.gov until midnight on April 11, 2008. The following is a brief synopsis of the proposed changes.

Refining the Definition of a "Serious Health Condition"

The FMLA defines a "serious health condition" as a physical or mental illness, injury, impairment or condition requiring inpatient care, or continuing treatment by a health care provider. Previous regulations provided that an employee incapacitated for more than three consecutive calendar days would qualify for this definition if the employee received a single treatment from a health care provider along with a continuing treatment, such as a prescription, or if the employee received treatment from his or her health care provider on two or more occasions. Those regulations, however, did not indicate within what period of time those two treatment sessions needed to occur to bring the condition within the FMLA's coverage. The proposed regulations provide that clarification by requiring that the two treatments occur within 30 days of the period of incapacity.

Perhaps the most often abused provision of the FMLA pertains to leave for a chronic serious health condition where the condition does not require a period of incapacity of more than three consecutive calendar days and does not require treatment during the absence. An employee need only show that s/he is subject to intermittent periods of incapacity and is under the treatment of a health care provider generally for the condition. Common examples of chronic serious health conditions include asthma, diabetes, epilepsy, and migraine headaches. The proposed regulations attempt to clarify how often patients suffering from chronic conditions must see their health care provider to qualify for leave under the chronic serious health condition definition. Current regulations call for "periodic" consultations, but provide no guidance regarding how periodic those visits must be. Under the new proposed regulations, the employee who suffers from a chronic condition must visit with his/her health care provider at least two times per year to qualify for intermittent FMLA leave.

Providing More Transparency to the Medical Certification Process

Under the current regulations, an employer may request that an employee provide a medical

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My Employee Is Leaving: What Do I Owe and What Can I Deduct at Termination?

BY JILL SEBEST WELCH

Employers frequently ask what they owe their employees at the time of termination. As a general matter, all wages earned by an employee up to the date of termination are to be paid at the time of termination or shortly thereafter. For hourly employees, this is a fairly straightforward computation. Under the federal regulations governing salaried, exempt employees, an employer is not required to pay the full salary in the terminal week of employment. Rather, an employer may pay a proportionate part of an employee's full salary for the time actually worked in the first and last week of employment. In such weeks, the payment of an hourly or daily equivalent of the employee's full salary for the time actually worked will meet the requirement.

Another frequently asked question is whether or not employers must pay for any accrued but unused paid time off -- vacation, sick or other paid time off -- at the time of an employee's termination. In Pennsylvania, wages include fringe benefits such as vacation and holiday pay. However, no statutory right to these fringe benefits exists. Thus, in Pennsylvania, an employment contract (which can be written or oral) or an Employee Handbook determines whether an employee is entitled to accrued but unused vacation pay or other paid time off at termination. Similarly, the employer's policies on severance or termination pay will bind the employer if those policies are either communicated to the employee or are the subject of an agreement between the parties. Pennsylvania employers may implement both a "use it or lose it" policy and a forfeiture provision

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certification form to substantiate the need for FMLA leave in connection with a serious health condition. The form, which must be completed by the treating health care provider, must provide information regarding the condition's nature, severity, and the expected duration of any period of incapacity. Employees who do not provide the necessary requested information may forfeit their entitlement to protected leave. Also under the current regulations, an employer who has questions about a medical certification form may not contact the certifying health care provider directly, but may request that a third party health care provider contact the treating health care provider -- with the employee's permission -- to confirm the certificate's authenticity, or the employer may order a third party examination of the patient at the employer's expense.

The proposed regulations would streamline this process by allowing the employer to pose questions directly to the health care provider regarding the authenticity of a submitted medical certification. However, when the employer seeks additional information about the patient's condition, as opposed to information regarding the medical certification document itself, the employer will be required to obtain the employee's consent. The proposed regulations, however, would view an employee's refusal to consent as a failure to provide proper medical certification. The proposed regulations also clarify that in the case of an incomplete or insufficient certification, the employer must state in writing the additional information needed and provide the employee with seven calendar days to cure the deficiency.

Additionally, the proposed regulations clarify how often an employer may seek medical certification. For conditions that last over a year, an employer may only request certification on an annual basis. For conditions of unknown or lifetime duration, an employer would be permitted to request re-certification once every six months. The proposed regulations also make clear that medical certifications for a reduced schedule or intermittent leave must indicate that such leave is medically necessary.

Employees Taking Intermittent Leave Must Follow Company Call-in Procedures

Perhaps the most frustrating and burdensome portion of the current FMLA regulations are the intermittent leave provisions. Unfortunately, the proposed regulations do not contain a major overhaul on this topic. The proposed regulations, however, would require that employees taking unscheduled intermittent leave use their company's call-in procedures. This marks a change from the current regulations, which allow the employee to take leave without notice and then designate the leave as FMLA-qualifying within two days of the absence. Under the proposed regulations, employees will only be able to use this latter approach in emergency situations.

Counting Holiday Leave

The proposed regulations also tackle the issue of whether to count scheduled holidays that occur while an employee is on FMLA leave towards the employee's twelve weeks per year allotment. The proposed regulations apply different rules depending on the amount of time the employee takes. When the employee takes week-long blocks of leave, intervening

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holidays will be counted against the employee's allotment of FMLA leave. However, where the employee takes FMLA leave of less than a week, an intervening holiday will not count against the employee's allotment. For example, for an employee with a Monday through Friday work week, in a week with a Friday holiday on which the employee would not normally report to work, if the employee needs leave for Wednesday through Friday, the employee would use only 2/5 of a week of leave and would not be assessed 1/5 of a week for the Friday holiday. On the other hand, if that same employee needs the entire week, the employee would use an entire week of leave despite not being required to report for work on Friday.

Encouraging Settlements Without DOL or Court Oversight

The FMLA contains a provision that makes it unlawful for an employer to interfere with or restrain the exercise of any right protected under the FMLA. The DOL's current regulations regarding this provision state that an employer cannot "induce employees to waive their rights under the FMLA." As we have reported previously, this language led to a debate among the courts whether employers wishing to settle FMLA disputes could do so without supervision from the DOL or without court approval. Most cases held that employers could settle disputes already in existence, but that the employer could not require an employee to waive future FMLA rights through such a settlement. However, a recent decision from the U.S. Court of Appeals for the Fourth Circuit (embracing federal courts located in Maryland, Virginia, West Virginia, North Carolina, and South Carolina) held that the DOL's waiver regulations prohibited all FMLA settlements without supervision from the DOL or without court approval. The proposed regulations, citing efficiency concerns and the public policy of promoting prompt settlements, permit settlements of retrospective claims without court intervention or DOL approval. However, employers may not enter into agreements waiving prospective rights under the FMLA.

Penalties for Failure to Give Notice

The U.S. Supreme Court in Ragsdale v. Wolverine World Wide, Inc.(2002) invalidated a penalty provision in the current regulations which stated that if an employer failed to designate FMLA leave at the commencement of the leave, the leave did not count towards an employee's FMLA-entitled leave. This provision meant that an employee could receive more than the 12 weeks of leave provided under the FMLA. The proposed regulations would modify the penalty provisions to incorporate monetary liability when an employee can demonstrate harm as a result of the employer's failure to provide notice of eligibility or designate the leave as FMLA as required in the regulations.

New Military Leave Provisions

The DOL does not propose any regulatory provisions to carry out the new military family leave provisions to the FMLA, but rather seeks public comment on a series of questions posed by the new provisions.

Conclusion

Given the current political climate, it remains to be seen what final format these proposed regulations will take. If and when the proposed regulations become final, employers will need to modify their FMLA policies to comply with the new regulations. In the meantime, employers should take advantage of the comment period to provide written input on the proposed regulations to the DOL and the likely impact to their businesses. However, to further complicate the issue, employers should be aware that the outcome of the upcoming presidential election may bring further regulatory changes under the FMLA, depending upon the majority party in office next year. This could lead to either an expansion of employee rights under the FMLA, or a narrowing of the scope of the FMLA to address business concerns.

Employers should continue to remain alert to the evolving changes in the FMLA regulations. Should the regulations become final, our Employment Law Group can assist you in reviewing and revising FMLA policies, providing supplemental supervisory/human resources training on the FMLA changes, and implementing policies into the workplace. Please contact Jennifer Craighead or David Freedman for assistance.

Jennifer L. Craighead *chairs the firm's Employment Law Group and counsels employers on personnel matters, conducting sexual harrassment and other investigations for employers, reviewing employment policies and handbooks, labor arbitrations, counseling in OSHA compliance and wage and hour issues under the FLSA, and defending employers in discrimination and other employment-related complaints. She can be reached at* ***(717) 399-1523; jcraighead@barley.com.***

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Important Considerations in Implementing "Donated Leave" Policies

BY RICHARD L. HACKMAN

"Donated leave," "leave-sharing," or "voluntary shared leave" programs or policies are an employee benefit that many employers offer to their employees. Essentially, a donated leave policy allows an employee to donate accrued hours of paid vacation, personal, or sick leave for the benefit of other employees who need more leave than they may have available. However, an employee's altruistic intentions may have unintended results.

The IRS has issued very little guidance with respect to the design and implementation of donated leave policies. Employers should be aware that, unless their donated leave policy meets certain specific requirements, the tax implications of such a policy could be shocking to employees.

Basic Principle

Tax law dictates that income for services is taxed to the person who earned it. Accordingly, if Employee A earns $500 for his work during a specific week, he will be taxed on that $500. Alternatively, if Employee A requests that his employer instead pay the $500 directly to his co-worker instead of to him, tax law dictates that even though Employee A never received the $500 he earned, the $500 is still taxable to Employee A.

Essentially, the same rule applies if, instead of transferring the $500 directly to the co-worker, Employee A decides to donate his earned Paid Time Off (PTO) to his co-worker. Consequently, if the co-worker is sick for an extended period of time and has exhausted her PTO, and Employee A tells her "I have extra PTO, just use mine," under general tax principles any pay that the co-worker receives from using Employee A's PTO will be taxable to Employee A, not the co-worker who received the extra time.

Exceptions

There are exceptions to this general rule. The IRS offers exceptions for employer-sponsored, leave-donation programs. The first exception allows for "bona fide leave-sharing arrangements" for medical emergencies, while the second exception covers leave banks for natural disasters. Leave donated under circumstances that do not meet the requirements of either of these two exceptions will ordinarily be taxed to the donor employee, and will also be considered the donor employee's wages for employment tax purposes.

<u>Medical Emergencies Exception</u>. An employer-sponsored, leave-sharing program may permit an employee to donate excess paid leave to another employee in the event of a medical emergency. A medical emergency is defined as "a medical condition of the employee or a family member that will require the prolonged absence of the employee from duty and will result in a substantial loss of income to the employee because the employee will have exhausted all paid leave available apart from the leave-sharing plan." Under the "medical emergencies" exception, the amounts received are not taxable to the donor and are considered "wages" of the recipient/donee for purposes of the Federal Insurance Contributions Act (FICA), the Federal Unemployment Tax Act (FUTA), and income tax withholding, unless excluded by a specific provision of the Internal Revenue Code. The leave donor may not claim an expense, charitable contribution, or loss deduction for any leave donated.

The IRS has set forth some guidance on what exactly constitutes a "bona fide employer-sponsored, leave-sharing arrangement" under the medical emergencies exception. In order to be valid, a leave-sharing arrangement should:

- Be in writing and be administered by the employer;
- Be created as a "leave bank" into which employees may deposit their donated leave, and from which the leave will be distributed to the employees who request it. "One-on-one" plans, where one employee gives directly donated leave to another employee, are more likely to be viewed as income to the donor employee, followed by a gift to the recipient;
- Specify that leave is to be used only for medical emergencies, which should be restricted to a major illness or medical condition of the employee or family member of the employee that requires a prolonged absence. The IRS has also approved plans that

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include extended time off following the death of a parent, child, or spouse;

- Have a procedure in place for employees to apply for leave, in writing, describing the medical emergency or condition. The employee should be eligible to receive leave from the bank only after the application has been approved and the applicant has exhausted all paid leave. Any leave received by the employee should be paid at the employee's normal rate of compensation;
- Specify any limits on the amount of paid leave time that may be surrendered by a given donor per year; and
- Make sure the leave transferred under the donation plan is actually used as medical leave by the recipient. If the program simply liquidates the donated leave and pays cash to the recipient, it will not be viewed as a qualified medical emergency leave program.

<u>Major Disaster Exception.</u> An employee may also draw from an employee-sponsored leave bank in the event that the employee experiences a "major disaster." A "major disaster" is defined as 1) a disaster "declared by the President under §401 of the Stafford Act that warrants individual assistance or individual and public assistance from the federal government" or 2) "a major disaster or emergency as declared by the President pursuant to 5 U.S.C., Section 6391." Like medical emergency plans, the leave donor under the major disaster plan may not claim an expense, charitable contribution, or loss deduction for any leave donated. Also, the payments to the recipient under the plan are treated as the recipient's "wages" for purposes of FICA, FUTA, and tax withholding, unless otherwise excluded under the Internal Revenue Code. To shift the tax liability from the donor to the recipient, the "major disaster leave-sharing plan" must be in writing and meet these requirements:

- The plan allows a donor to deposit accrued leave into an employer-sponsored leave bank for the use of other employees who have been "adversely affected by a major disaster," which means the disaster has caused severe hardship to the employee or family members of the employee and requires the employee to miss work;
- The plan does not allow a leave donor to specify a leave recipient. A leave recipient may receive paid leave (at the recipient's normal rate of pay) from leave deposited in the bank. The leave must be used for purposes related to the natural disaster;
- The amount of leave a donor may donate in any given year may not exceed the maximum amount of leave that s/he normally accrues during the year;
- Based on the severity of the disaster, the plan places a reasonable limit on the period of time after the disaster occurs when leave can be donated and used;
- A recipient may not receive cash in lieu of using the paid leave received;
- The employer must make a reasonable determination of the amount of leave a recipient may receive;
- Leave deposited for one major disaster may only be used by employees affected by that disaster. Leave deposited in the bank that is not used by the end of the specified period must be returned to the donors; and
- This tax-shifting exception only applies to leave-sharing plans that are established for major disasters as declared by the President of the United States.

Conclusion

It is important for employees to understand and avoid adverse tax consequences to a donor employee under a leave-sharing program, and for an employer to know which employee receives taxable wages. If the program properly fits within one of the two exceptions, the tax liability will be effectively shifted from the donor to the recipient. The attorneys in our Employment Law Group can help if you would like to discuss your implementation of a donated leave policy or revisions to your current policy.

Richard L. Hackman *represents management and employers in all aspects of labor and employment law, and routinely represents employers in employment litigation matters. His practice also includes revising employee handbooks, reviewing and drafting employee contracts, severance agreements, non-competition agreements, and other employment-related documents. He can be reached at* ***(717) 399-1579; rhackman@barley.com.***

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with regard to the payment of accrued but unused paid time off at the time of termination. An employment agreement or policy may also provide for forfeiture of a bonus if an employee is discharged "for cause." However, in the absence of a clearly defined contract or handbook provision, courts will likely find that employees must be paid for all wages, including accrued but unused paid time off at separation. Each state addresses this issue differently, so it is important to verify each state's approach before implementing such policies.

Pennsylvania's wage regulations also place limitations on the deductions that employers may take from an employee's wages, including those at the time of termination. Deductions may be made from an employee's paycheck only for certain items, or for the convenience of the employee if authorized in writing in advance by the employee. Only the following deductions for the convenience of the employee are permissible:

- Contributions to and recovery of overpayments under employee welfare and pension plans;
- Contributions authorized in writing by employees or under a collective bargaining agreement to employee welfare and pension plans not subject to the Federal Welfare and Pension Plans Disclosure Act. These include group insurance plans, hospitalization insurance, life insurance, provided such insurance policies are written by companies certified by the Pennsylvania Insurance Department, and group hospitalization and medical service programs offered by nonprofit hospitalization and medical service organizations and medical group plans;
- Deductions authorized in writing for the recovery of overpayments to employee welfare and pension plans not subject to the Federal Welfare and Pension Plans Disclosure Act;
- Deductions authorized in writing by employees or under a collective bargaining agreement for payments into company-operated thrift plans or stock options or stock purchase plans to buy securities of the employer or an affiliated corporation at market price or less, provided such securities are listed on a stock exchange or are marketable over the counter;
- Deductions authorized in writing by employees for payment into employee personal savings accounts such as: (a) Payments to a credit union; (b) Payments to a savings fund society, savings and loan, or building and loan association; (c) Payments to the savings department of banks for Christmas, vacation, or other savings funds; and (d) Payroll deductions for the purchase of U.S. government bonds;
- Contributions authorized in writing by the employee for charitable purposes;
- Contributions authorized in writing by the employee for local area development activities;
- Deductions provided by law, including but not limited to Social Security taxes, withholding of federal or local income or wage taxes or occupation privilege taxes, and deductions based on court orders;
- Labor organization dues, assessments and initiation fees, and such other labor organization charges as are authorized by law;
- Deductions for repayment to the employer of bona fide loans, provided the employee authorizes such deductions in writing either at the time the loan is given or subsequent to such loan. This may also include tuition reimbursement programs;
- Deductions for purchases or replacements by the employee from the employer of goods, wares, merchandise, services, facilities, rent, or similar items, provided such deductions are authorized by the employee in writing or are authorized in a collective bargaining agreement;
- Deductions for purchases by the employee for his/her convenience of goods, wares, merchandise, services, facilities, rent, or similar items from third parties not owned, affiliated, or controlled directly or indirectly by the employer if the employee authorizes such deductions in writing; and

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Barley Snyder Welcomes David J. Freedman

David J. Freedman has joined Barley Snyder and our Employment Law Practice Group. David represents employers in all aspects of labor and employment litigation before administrative tribunals and state and federal courts. David counsels employers on issues related to employee discipline and termination, workplace harassment, the FMLA, the ADA, the FLSA, and other employment laws. David also represents public and private colleges on student rights and discipline issues.

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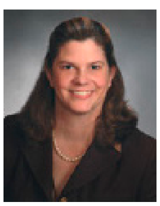
- Such other deductions authorized in writing by employees as, in the discretion of the Pennsylvania Department of Labor and Industry, are proper and in conformity with the intent and purpose of the Wage Payment and Collection Law.

Deductions cannot be taken for the employer's benefit, as in the case of damaged goods or failure to return property. On the other hand, when the employer seeks repayment of a loan made for the employee's benefit, such a deduction is permissible provided that the deduction was authorized in writing in advance by the employee. In no case, however, can a deduction be made that takes the employee below the minimum wage in Pennsylvania.



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