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FMLA can cause big headaches and other pains

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The Family Medical Leave Act of 1993 (FMLA) affords eligible employees leave to attend to certain personal and family health and related matters, while also providing them with job assurances. If an employee meets the eligibility requirements, the employer is required to provide up to 12 workweeks of unpaid leave during a 12-month period for FMLA-qualifying reasons. Political subdivisions are statutorily covered employers. The following are some important reminders about this complicated law.

Employee Eligibility: To be eligible for FMLA leave, an employee must have worked with an employer for at least 12 months, must have worked at least 1,250 hours during the 12 months immediately preceding the start of the leave, and must be employed at a site where the employer employs at least 50 or more employees, at the site or within 75 miles of the site.

Eligibility Exclusions: Excluded from the definition of "employee" are persons who are not subject to the civil service laws of the state, political subdivision or agency which

employs them, and who (1) hold a public elective office of that state, subdivision or agency; (2) are selected by the holder of such an office to be a member of his/her personal staff; (3) are appointed by such an office holder to serve on a policymaking level; (4) are immediate advisors to such an office holder with respect to the constitutional or legal powers of the officeholder; or (5) are employees of the legislative branch or body of that state, political subdivision or agency.

How to Count Leave: Preliminarily, employers should define how they measure the 12-month period using a calendar year basis or one of the rolling-year bases specified in the law. Failing to do so could result in an eligible employee being on leave for the last three months of a calendar year and the first three months of the following calendar year, thus creating unanticipated consequences for employers.

Grounds for Leave: While the FMLA requires extending unpaid leave, employers who wish to provide any paid leave time or who require employees to deplete accrued or available paid time off should specify such requirements in their policies.

The permissible reasons for using FMLA leave include:

- the birth and care of the newborn child of an employee;
- placement with the employee of a child for adoption or foster care;
- to care for an immediate family member (spouse, child or parent) with a serious health condition (as that term is defined in the FMLA); or
- to take medical leave when the employee is unable to work because of a serious health condition.

The FMLA was amended a number of years ago to provide two new grounds that offer employees serving in the military or their family members with time to attend to important needs. One amendment permits employees to take up to 26 weeks of military caregiver leave to care for a covered service member who is injured or becomes ill while on covered active duty. Notably, the employee qualifying to request such a leave need not be the spouse, parent or child of the service member, but also “next of kin,” which can include any blood relative designated by the service member or a person who has been granted legal custody of the service member.

The other amendment allows military personnel to use up to 12 weeks of FMLA leave for a qualified exigency resulting from call-up for service or related activities. These might include, but are not limited to, attending military events or ceremonies, making childcare arrangements, making arrangements for the care of the service member’s parents who are incapable of self-care, and making financial and legal arrangements.

Requesting Leave: When an employee requests family medical leave, the employer should provide the employee with a Notice of Eligibility and Rights and Responsibilities (DOL Form WH-381), and with the appropriate certification form. The DOL website contains various downloadable certification forms.

The employer must notify the employee of his/her eligibility for FMLA leave within

five business days and must designate the leave as paid or unpaid within five days of the beginning of the leave. The designation should be based upon information provided to the employer by the employee, including medical certification. An employee's FMLA leave does not begin to run until it has been designated as FMLA leave by the employer.

Leave Certification: Employees have 15 days to return the provider certification to their employer. Employers are limited in their abilities to communicate with medical providers, so it is essential to know what to do if the form appears to contain inconsistencies or to raise questions about authenticity. Very generally, employers may need to resort to obtaining a second medical opinion, at the employer's expense. Employers should also understand their legal obligations when an employee fails to return the medical certification within 15 days.

Intermittent Leave: An eligible employee requesting FMLA leave may take leave in one continuous block, or intermittently and/or as part of a reduced leave schedule when medically necessary for the treatment of the employee or the employee's child, spouse or parents with a "serious health condition," or for recovery from treatment or the condition. Eligible employees taking leave for the birth and care of a child or the placement of a child for adoption or foster care may only use intermittent leave or reduced-schedule leave with express employer consent.

When possible, employers should coordinate with employees requesting intermittent or reduced leave to ensure that leave is taken in a way that is least disruptive to business operations. This could involve temporary schedule accommodations, alternative assignments, requests to schedule appointments at the beginning or end of shifts, or similar adjustments.

Job Restoration Rights: Returning an employee from leave can also sometimes prove challenging. Again, it is important to understand any obligations under the FMLA, any applicable CBAs and the Americans with Disabilities Act. Unless the employee is deemed a "key employee," an employer must reinstate the employee to the employee's original or equivalent position, with equivalent pay and benefits, upon return from leave.

Key Employees. A "key employee" is a salaried, FMLA-eligible employee who is among the highest paid 10 percent of all the employees employed within 75 miles of the employee's worksite. In order to deny job restoration to a key employee, the employer must determine that doing so will cause "substantial and grievous economic injury" to the employer's operations, not whether the absence of the employee will cause such substantial and grievous injury.

Other Benefits: In addition to providing leave to qualifying employees, the FMLA also requires employers to continue to maintain group health benefits during the leave and to contribute the same employer portion of the premium on behalf of the employee. The employer should implement a procedure for collecting the employee

portion of the premium, particularly when the employee is out of paid time or salary continuation from which premiums may be deducted.

Practice Pointers:

- Know whether your municipality uses a calendar year or rolling year basis for calculating FMLA leave, and if the latter, which type of rolling year basis. Note: if an employer changes to a different method of calculating leave, it must provide employees with 60 days of advance notice of the change.
- Understand what is and isn't a "serious health condition."
- Understand what forms you need to provide to the employee requesting leave and when it is not appropriate to require forms. The U.S. Department of Labor has many forms available on line, but your municipality may wish to consider whether additional information is helpful to requesting employees.
- Work with HR and Payroll/Finance to understand how leave should be tracked. "Twelve weeks" does not always mean 12 calendar weeks or even 480 hours. For example, an employee who regularly works overtime and averages 44 hours a week of work may be entitled to a different amount of FMLA time.
- Understand the intermittent leave regulations. Employees whose medical providers have certified that they are under their care for a chronic type of condition may be entitled to use FMLA leave intermittently, which will alter whether the employer is permitted to request more than one medical slip per six-month period of treatment for each chronic condition. Electronic absence reporting software can help track and monitor leave, but is not a panacea for FMLA administration. Employers must also consider how to track the use of paid sick time or other type of paid time that runs concurrently with FMLA, and how this aligns with any collective bargaining agreement.
- Understand the employer limitations on communicating with employees' medical providers. Except in limited circumstances that permit employers to seek narrow clarifications of conflicting information, employers can generally only use a second medical opinion to verify information in a treating physician's certification for leave.
- Understand your obligations once the FMLA leave has expired. Many employers mistakenly think they can terminate an employee who fails to return from FMLA leave, or who requests more leave time. Employers are cautioned to understand the interplay between the FMLA and the Americans with Disabilities Act. Depending on the facts of the situation, additional leave may be a reasonable accommodation.
- Understand whether any collective bargaining agreements impact administration of the leave.
- Train management on how to spot FMLA issues and when they should call you.
- Run all leaves, including workers' compensation or injury leaves, concurrently

with FMLA.

- Rely on medical professionals (a.k.a. don't play doctor).
- Before rushing to judgment about whether a leave request is legitimate, be sure to have support for any leave request you believe to be inauthentic.
- Conspicuously post notices as required by the FMLA.

FMLA leave scenarios are intensely fact-driven and can be challenging to assess. Municipalities should periodically review their handbooks or FMLA policies to make sure recent changes have been incorporated. And, of course, managers and HR personnel are advised to consult with their law directors to avoid the many pitfalls that accompany the FMLA.