Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.

EMPLOYMENT LAW MATTERS

Latest legal developments and practical guidance for effective HR management October 2004

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In this issue …

Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C. provides comprehensive legal representation and counseling exclusively to public and private sector employers in the areas of employment law and labor relations.

HIPAA is NOT the Only Law Limiting Access to an Employee's Job-Related Health Information

As we noted in last month's edition of *Employment Law Matters*, employers should be aware that even when the requirements of HIPAA are satisfied, both the Family and Medical Leave Act (FMLA) and the Americans with Disabilities Act (ADA) provide additional rules that must be observed when obtaining necessary medical information about an employee.

FMLA

The FMLA allows an employee to take up to 12 weeks of job-guaranteed leave for the employee's own or an immediate family member's "serious health condition". The law permits an employer to verify the existence of such a condition through the use of a medical certification form. The U.S. Department of Labor developed a form (WH-380) for employers to use in this process. The form should be given to the employee with instructions to provide it to his/her treating physician to be completed. Under the FMLA rules, an employer must allow the employee at least 15 calendar days to return the completed form. (29 CFR §825.311.) Thereafter, the rules generally allow an employer to obtain follow-up certifications every 30 days. (29 CFR §825.308.) If the employee fails to provide these certifications when required by the employer, "the employer may delay the employee's continuation of FMLA leave [or, if] the employee never produces the certification, the leave is not FMLA leave." (29 CFR §825.311(b).)

The bottom line is ...

In addition to HIPAA, employers must follow the steps outlined in the FMLA and the ADA to obtain an employee's job-related health information.

An employer who has reason to doubt the validity of a medical certification may require the employee to obtain a second opinion at the employer's expense. Pending receipt of the second (or third) medical opinion, the employee is provisionally entitled to the benefits of the FMLA, including maintenance of group health benefits. If the certifications do not ultimately establish the employee's entitlement to FMLA leave, the leave shall not be designated as FMLA leave and may be treated as paid or unpaid leave under the employer's established leave policies. The employer is permitted to designate the health care provider to furnish the second opinion, but the selected health care provider may not be employed on a regular basis by the employer. (29 CFR §825.307(a)(2).)

ADA

Under the ADA (and the New York State Human Rights Law), when an employer learns that an employee may have a disability, the employer and the individual should engage in an "informal dialogue" to clarify what the individual needs and identify the appropriate reasonable accommodation. The employer may ask the individual relevant questions that will enable it to make an informed decision. This includes asking what type of reasonable accommodation is needed. The exact nature of the dialogue will vary. In many instances, both the disability and the type of accommodation required will be obvious, and thus there may be little or no need to engage in any discussion. In other situations, the employer may need to ask questions concerning the nature of the disability and the

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HIPAA is NOT the Only Law Limiting Access to an Employee's Job-Related Health Information (continued)

individual's functional limitations in order to identify an effective accommodation. While the individual with a disability does not have to be able to specify the precise accommodation, he/she does need to describe the problems posed by the performance of his/her job. Additionally, suggestions from the individual with a disability may assist the employer in determining the type of reasonable accommodation to provide. The employer does not, however, have to provide the employee with the accommodation suggested. It can choose to provide any accommodation which is effective.

In other words, an employer can only seek medical documentation when the **disability and/or the need for accommodation is not obvious.** If it is obvious, the employer may not seek further information. If it is not, the employer is entitled to "reasonable documentation" demonstrating that the individual has a covered disability for which he/she needs a reasonable accommodation. "Reasonable documentation" means that the employer may require only the documentation that is needed to establish that a person has an ADA disability, and that the disability necessitates a reasonable accommodation. Thus, an employer **cannot ask for documentation that is unrelated to determining the existence of a disability and the necessity for an accommodation**. This means that in most situations an employer cannot request a person's complete medical records because they are likely to contain information unrelated to the disability at issue and the need for accommodation.

In requesting documentation, an employer should specify what types of information it is seeking regarding the disability, its functional limitations, and the need for reasonable accommodation. The employee can be asked to sign a limited release (also satisfying the HIPAA authorization requirements) allowing an employer to submit a list of specific questions to the employee's treating physician. If an employee's disability or need for reasonable accommodation is not obvious, and he/she refuses to provide the reasonable documentation requested by the employer, then the employee is not entitled to reasonable accommodation.

You should also be aware that the ADA does not prevent an employer from requiring an employee to go to a physician of its choice if the employee provides "insufficient information" from his/her treating physician to substantiate that he/she has an ADA disability and needs a reasonable accommodation. Documentation is "insufficient" if it does not specify the existence of an ADA disability and explain the need for reasonable accommodation. Documentation also might be insufficient where, for example: (1) the health care professional does not have the expertise to give an opinion about the employee's medical condition and the limitations imposed by it; (2) the information does not specify the functional limitations due to the disability; or (3) other factors indicate that the information provided is not credible or is fraudulent. However, if an employee provides insufficient documentation in response to the employer's initial request, the employer should explain why the documentation is insufficient and allow the individual an opportunity to provide the missing information in a timely manner. If an employee provides insufficient documentation, an employer does not have to provide reasonable accommodation until sufficient documentation is provided.

"Fluctuating Workweek" May Ease Pain of the New Overtime Rules

In recent months, our firm has fielded many questions from clients facing a significant overtime burden for employees who are no longer considered "exempt" under the new overtime pay regulations. To ease this burden, some of our clients have adopted a somewhat obscure compensation method for those employees, known as "the fluctuating workweek method".

Fluctuating workweek overtime pay is a method of complying with the Fair Labor Standards Act (FLSA) that has the potential of saving an employer money in overtime costs. Under this method, the non-exempt employee is paid a **fixed salary** for all hours worked, whether the employee works less than 40 hours or more than 40 hours. In weeks in which the employee works more than 40 hours, the employee is paid an overtime premium for the extra hours. The employer can save money because it is paying the employee a salary that involves fewer administrative costs, and, more importantly, **any overtime premiums are paid at 50% of the employee's regular hourly rate of pay.**

To use this method of payment, an employer must conform to certain rules as outlined in the Code of Federal Regulations (i.e., 29 CFR §778.114.) The rules allow the use of this method under the following circumstances:

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"Fluctuating Workweek" May Ease Pain of New Rules (continued)

- There must be an understanding between the employer and the employee that the employee will be paid using the fluctuating workweek method.
- The workweek of the employee must actually be a fluctuating one.
- The employee must be paid a fixed salary regardless of the number of hours worked each week. Employees who are paid an hourly wage do not qualify.
- The salary must be sufficiently large enough so that the regular rate of pay will never drop below the minimum wage.

In addition to salary, the employee must be paid overtime premiums for any hours worked over 40 in the workweek. The overtime premium rate is 50% of the regular hourly rate of pay for the workweek.

If you have any questions about establishing the fluctuating workweek method at your company, contact Nick Fiorenza at 315-437-7600.

Department of Labor Issues First-Ever Military Leave Regulations

On September 20, 2004, the U.S. Department of Labor's (DOL) Veterans' Employment and Training Service issued proposed federal regulations under the Uniformed Services Employment and Reemployment Rights Act ("USERRA"). These are the first regulations issued under USERRA, which governs employee rights and employer obligations with regard to military leave.

The regulations, developed in consultation with the U.S. Department of Defense, are designed to bring greater clarity to USERRA by providing "clear and consistent guidance" regarding the statute's requirements for employers, veterans, and military reservists. For example, the proposal provides new guidance on situations where employees return from military leave to resume part-time, probationary, or seasonal positions, where the position formerly held by the employee is on layoff status and the employee is subject to recall, and where two or more returning service members claim reemployment rights to the same position. The regulations also clarify service members' benefits, such as health insurance coverage rights and benefits based on performance and/or seniority. The regulations also are intended to clarify USERRA's protections of returning service members against discharge as an exception to the employment-at-will doctrine. The proposed regulations invite public comments for a 60-day period. Following this 60-day period, the DOL plans to issue final regulations which would become effective 30 days from the date of that publication.

To obtain a copy of the proposed regulations, visit the DOL's web site at http://www.dol.gov/vets/programs/userra/main.htm.

Scope of FMLA Broadens … Again

A recent case highlights the fact that many lesser forms of adverse employment action can also result in employer liability under the FMLA's less-publicized prohibition against "unlawful interference "with an employee's exercise of FMLA rights. In *Schmauch v. Honda of America Manufacturing*, a federal court concluded that an employer's actions in **extending the duration** of a disciplinary probationary period (due to attendance problems) could constitute a violation of the FMLA. In *Schmauch*, Honda followed its attendance policy and placed an employee on "probation" because of his attendance. Under this policy, absences taken during that probationary period, including FMLA leave, extended the period by the number of days spent on such leave. Other categories of leave, however, such as leaves for bereavement, court appearances, etc. did not extend the probationary period. After returning from the FMLA leave but prior to the expiration of the extended probationary period, the employee had an unexcused absence. As a result, he was summarily terminated for violating his probation. The court in *Schmauch* found that the employer's probation extension violated the statute because it could have interfered with the employee's decision to exercise his rights under the FMLA. **In other words, any policy that potentially discourages an employee from exercising his right to FMLA leave, may constitute unlawful interference.**

EMPLOYMENT LAW MATTERS is published monthly by **Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C., 5010 Campuswood Drive, East Syracuse, New York, 13057, 315-437-7600, www.ferrarafirm.com.**

Ferrara-Fiorenza Law Firm's Breakfast Briefing Schedule

The following workshops, presented to the public at no charge, will be held from 7:45 AM to 9 AM at the Wyndham Hotel, 6301 Route 298, East Syracuse, New York (location subject to change). Call 315-437-7600 to make reservations today!

DATE	TOPIC
October 14, 2004	What You Don't Know About Employee Documentation
December 9, 2004	Employment Law: The Year in Review

HR ADMINISTRATION AND TRAINING SERVICES

The Ferrara-Fiorenza Law Firm provides a full range of HR administration consulting services, including, in part:

- ❑ A comprehensive audit of your HR policies, practices and procedures.
- ❑ Advice for complying with employment laws.
- ❑ More effective, more efficient HR policies, practices and procedures, along with implementation strategies and assistance.

The Firm also works with employers to tailor training on a variety of personnel issues for managers/ supervisors, including:

- ❑ Minimizing the Risk of Employment Litigation
- ❑ Preventing Workplace Harassment
- ❑ Leadership and Influence
- ❑ Managing Non-Performing Employees

For more information on the services Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C. can provide to you, contact us at 315-437-7600.

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