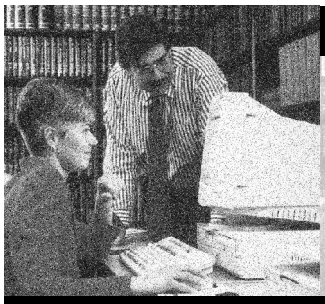

Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.

EMPLOYMENT LAW MATTERS

Latest legal developments and practical guidance for effective HR management March 2006

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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.

Employees Can Be Eligible for FMLA Even With Less Than 1,250 Hours of Service, DOL Says

By now, most employers are familiar enough with the Family and Medical Leave Act (FMLA) to know that it does not apply to employees who have worked less than 1,250 hours in a 12-month period. But, what if you have an employee requesting FMLA leave who is barely at or above that threshold number of hours?

It is the U.S. Department of Labor's position that once an employee has worked exactly 1,250 hours in the 12-month period ***immediately preceding the commencement of leave***, the employee is entitled to a full 12-weeks of leave (for the condition necessitating the leave); even if the use of that leave would lower the employee's hours of work for a "rolling year" below 1,250.

The concept of a "rolling year" can be somewhat confusing, but basically what it means is that each new day is a new end to a 12-month period. In other words, February 14 would be an end to one rolling year which commenced 365 days before, and February 15 would be the end to another rolling year, and so forth.

The FMLA statute and regulations permit employers to calculate whether an employee has exhausted his/her 12 weeks of job-guaranteed leave under the Act on this rolling-year basis. This means that if an employee took 12 weeks of leave during any rolling 12-month period, he/she would not be entitled to any more FMLA leave (at least, not until more time passed).

The bottom line is ...

Once an employee has worked 1,250 hours immediately preceding the commencement of leave, the employee is entitled to a full 12-weeks of leave; even if the use of that leave would lower his/her hours below 1,250.

Let's say, for example, you have an employee who took 12 weeks of FMLA leave ending on Valentine's Day, February 14, 2005. If the employee made another request for FMLA leave a year later, on Valentine's Day 2006, the employee would be entitled to another full 12 weeks of FMLA leave (assuming the employee is otherwise qualified). However, if the employee's first 12-week FMLA leave ended March 31, 2005 (six weeks after February 14, 2005) and then he/she requested a new FMLA leave on February 14, 2006, the employee would only be entitled to six weeks of leave. This is because during the rolling year ending on Valentine's Day 2006, the employee already used six weeks of his/her FMLA leave entitlement.

This rolling year concept is also used to determine whether an employee has worked the requisite 1,250 hours to qualify for FMLA leave. If, for example, an employee asks for FMLA leave today and you look back over his/her time records for the last 12 months and discover that he/she has only worked 1,249 hours, the employee would not be eligible for FMLA leave. However, if the employee worked one more hour today, he/she would be entitled to the leave.

Since time spent on FMLA leave is not counted as "hours worked" toward that 1,250-hour threshold, one would logically assume that an employee who just barely meets that threshold would no

Continued on next page

Employees Can Be Eligible for FMLA Even With Less Than 1250 Hours of Service, DOL Says (cont'd)

longer be eligible for FMLA leave after taking any such leave. In other words, if an employee asks for FMLA leave today and you look back over his/her time records for the last 12 months and discover that he/she has worked exactly 1,250 hours, the employee would be eligible for leave. However, one would assume that if the employee were to take an FMLA-leave day today, he/she would no longer be eligible for FMLA leave tomorrow. Why? Because tomorrow would be the end of another rolling year in which the employee has not worked at least 1,250 hours; thereby destroying the employee's FMLA-leave eligibility.

However, the U.S. Department of Labor ("DOL") has a very different interpretation of the FMLA in this regard. The DOL's regulations state that an employee is entitled to take all 12 weeks of leave – whether taken in a block or intermittently – if the employee meets the 1,250-hour threshold ***immediately preceding the commencement of leave***. *(See U.S. Dept. of Labor, Wage & Hour Division, Opinion Letters FMLA-112, FMLA 2002-6, and FMLA 2005-3-A).* These DOL Opinion Letters state that this is a once-a-year determination for each FMLA-qualifying situation. For example, if an employee with exactly 1,250 hours of service requests six weeks of FMLA leave for hernia surgery, the DOL would hold that the employee should get those six weeks of leave for that condition. This is despite the fact that at the end of that 6 weeks the employee would be well below the 1,250 hours of service for the rolling year ending on the last day of the employee's leave. If the employee returned to work at that point and, within a few days, asked for an additional 2 weeks of FMLA leave for an unrelated condition (e.g., a broken arm) the employee would not be eligible for the leave because he/she does not meet the 1,250-hour eligibility threshold.

This interpretation becomes even more cumbersome when dealing with an employee – at or near the 1,250-hour threshold – who is taking FMLA leave on an intermittent basis. The DOL interpretation could lead to a situation where an employee is eligible for FMLA leave for one condition but not for another at the same time. Let's say you have an employee who is diagnosed with a chronic condition like diabetes as soon as he/she meets the 1,250-hour threshold. According to the DOL, that employee would be entitled to intermittent leave for that condition (and that condition alone) for up to one calendar year following the first day of leave. Assume further that that same employee develops another FMLA-qualifying condition (e.g., a broken arm). Due to the intermittent FMLA leave taken for the diabetes, the employee's hours of service for the rolling year has dipped below 1,250. As a result, under the DOL interpretation, the employee would not be eligible for FMLA for the broken arm. But, the employee could continue to take FMLA leave for the diabetes.

From an employment law standpoint, this situation is made even more frustrating by the fact that the DOL interpretation in this regard is not consistent with the plain language of the FMLA statute. The FMLA states that for an employee to be eligible for FMLA leave, the employee must have "... at least 1,250 hours of service with such employer during the preceding twelve-month period." *29 USC §2611(2).* In its regulations interpreting this provision of the law, the DOL states that an employee must have performed "at least 1,250 hours of service the twelve-month period ***immediately preceding the commencement of leave***. (Emphasis added)" *29 CFR §825.110 (a)(2).* The phrase ***"immediately preceding the commencement of leave***" does not appear in the statute and there is case law in our jurisdiction which calls into question whether such an interpretation is even legal. Specifically, the Second Circuit Court of Appeals has, in the past, invalidated similar DOL regulations for unlawfully widening the statutory definition of an "eligible employee". (*See e.g., Woodford v. Community Action of Green County, Inc.,* 268 F.3d 51 (2d Cir., 2001.)

Nevertheless, the DOL has stated that until this rule is successfully challenged in court, it will enforce its interpretation. The DOL justifies its position by saying that it believes that there is a distinction between the 12-month period applied to calculate whether an eligible employee's **leave entitlement has been exhausted** (i.e., whether the employee has used all of his/her 12 weeks during the preceding 12-month period), from the 12-month period used for testing whether an employee is **eligible for leave** under the 1,250 hours of service test. However, in reality, both are calculated on a rolling year basis. The only difference is that based on the DOL's interpretation, the rolling year stops each time a leave is commenced and remains stopped (for that condition) until one calendar year from the leave's commencement.

In any event, unless/until this interpretation is overturned in court, employers should do their best to follow the DOL's interpretation. If you have any questions regarding this very complex area of the law, please contact Mike Dodd of our office at 315-437-7600.

Maintaining Control of Confidential Medical Information Under the ADA

You learn that one of your employees has a communicable disease like Hepatitis C or AIDS. Do you have an obligation to tell the employee's co-workers? What about the employee's privacy?

The Equal Employment Opportunity Commission (EEOC) recently issued guidance (in the form of a non-binding informal letter) in response to an employer's question about these very topics. Specifically, the EEOC stated that even in these situations, the ADA "prohibits employers from disclosing medical information about applicants and employees." However, the agency noted two exceptions to this rule. First, an employer is permitted to share confidential medical information with certain individuals within the company, e.g., HR managers and supervisors, if there is a need to provide a reasonable accommodation to the employee. Second, the EEOC noted that first aid or safety personnel may be given confidential medical information if an employee's disability might require emergency treatment.

Therefore, from the EEOC's perspective, employers should only divulge an employee's confidential medical information to those within the company who have a legitimate "need to know." This apparently would not include co-workers of an employee with Hepatitis C.

Should an employer (or HR manager, or supervisor) disclose an employee's confidential medical information to the employee's co-workers in violation of this rule, the employee would likely have a valid claim of ADA discrimination against the employer. Damages for ADA violations can be as high as $300,000, depending on the severity of the violation.

Accordingly, to prevent unlawful disclosure of confidential medical information, employers should:

- Keep all employee medical records in a secure file cabinet or similar storage area, separate from the employees' regular personnel files.

- Clearly identify which employees within their company have a legitimate "need to know" such information and only permit these individuals access to the confidential information. Typically, this will include HR managers, supervisors (where the employee requires a reasonable accommodation), EEO Compliance officers, and first aid/safety personnel.
- Direct all employees with access to confidential medical information not to divulge that information to anyone else.

- Get employees to sign a release of legal claims in the event it becomes necessary to disclose medical information to someone other than those individuals with a "need to know".

If you need further information regarding the foregoing, or if you need assistance in drafting a release, please contact our office at 315-437-7600.

Reminder: State's Minimum Wage Increased to $6.75 As of January 1, 2006

New York's minimum wage increased on January 1, 2006 from $6 per hour to $6.75 per hour. This is the second increase mandated by a state Minimum Wage law passed in 2004. The third and final increase called for in this law (i.e., to $7.15 per hour) will take effect on January 1, 2007.

Other changes to the State Department of Labor's Minimum Wage Order (the regulations designed to implement the Minimum Wage law) are also being phased in. One such change creates a higher salary threshold for certain "white-collar" exemptions to the overtime pay requirements. Specifically, in order for an "executive" or "administrative" employee to be exempt from receiving one-and-a-half times their regular hourly pay for overtime hours worked, the employee must make at least $506.25 per week in salary. The threshold will increase again in 2007 to $536.10 per week.

This is significantly more than the threshold amount required for overtime exemption under the federal Fair Labor Standards Act (FLSA). Under the FLSA, such employees need only make a salary of $455 per week (in addition to the other qualifying criteria) in order to be considered exempt.

For more information on New York State's minimum wage requirements, please contact our office.

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Employees Working More Than 10 Hours in a Day Entitled to Additional Pay, Federal District Court Rules

A federal district court recently ruled that employees working more than 10 hours in a day are entitled to additional compensation beyond regular wages and overtime, based on an obscure New York Labor Law regulation (i.e., Title 12 N.Y.C.R.R. Section 142-2.4). *See Yang v. ACBL, Inc.*, 2005 WL 3312000 (S.D.N.Y.) Section 142-2.4 states that "an employee shall receive one hour's pay at the basic minimum hourly wage … for any day in which … the spread of hours exceeds 10 hours …." The phrase "spread of hours" is defined as "the interval between the beginning and end of an employee's workday." In other words, when an employee works more than 10 hours in a day, the employee is entitled to additional compensation (over and above the employee's regular wages or overtime) in the amount of $6.75 (i.e., the equivalent of one hour at the current minimum wage rate). However, the New York State Department of Labor (NYSDOL) has long advised employers that if the weekly wages actually paid to an employee equal or exceed the total of: (i) 40 hours paid at the basic minimum wage rate; (ii) overtime paid at the particular employee's overtime rate; and (iii) one hour's basic minimum wage rate for each day the employee worked in excess of 10 hours, then no additional compensation is due. As a result of this interpretation, most employers were never required to pay such employees any additional compensation because their wages were far enough above the minimum wage.

In *Yang*, the Court rejected the NYSDOL guidance stating that:

> "the effect of adopting the agency's interpretation would be to carve out an exception to the spread of hours provision for workers who are properly paid overtime and make more than the minimum wage. As this is a question of legal interpretation, deference is not required. Defendants do not offer any argument that the regulation's language itself dictates this exception, and the Court sees none."

As a result of this decision, employers should review their wage and hour practices to ensure that they are properly compensating covered employees for those days in which they work more than 10 hours.

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