Employment Law Matters

December 2013

A Newsletter from the Law Firm of Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.

Hot Topics

New Guidance from U.S. Dept. of Labor Clarifies Criteria for Employees To Take FMLA Leave to Care for Adult Children

An employee comes to you and asks for leave to care for a 26-year-old daughter who, due to complications associated with her pregnancy, has been ordered by her doctor to undergo bed rest for two months. The daughter is married and her husband is available to assist with her care. Is your employee entitled to take the time off under the Family and Medical Leave Act (FMLA)? According to a recent opinion issued by the U.S. Department of Labor (DOL), the answer is probably "yes." (See U.S. Department of Labor's, Wage and Hour Division, Administrator's Interpretation No. 2013-1.)

The FMLA entitles an eligible employee to take up to 12 workweeks of unpaid, job-protected leave during a 12-month period to care for a "son or daughter" with a serious health condition. The FMLA defines a "son or daughter" as a "biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis", who is either "under 18 years of age; or … **18 years of age or older and incapable of self-care because of a mental or physical disability**. (Emphasis added.)

For years, it has been unclear how the DOL defined "incapable of self-care because of a mental or physical disability." Some "experts" interpreted it as applying only to those adult children with the most severe mental and physical disabilities who were not capable of living independently, while others applied it to adult children with even temporary disabilities like broken legs. The new DOL Administrator's Interpretation comes down somewhere in the middle.

Specifically, the Interpretation states that, "[a] parent will be entitled to take FMLA leave to care for a son or daughter 18 years of age or older, if the adult son or daughter:

> ***FMLA-eligible employees are entitled to take FMLA leave to care for an adult child, provided that the child: 1) has an ADA-defined "disability"; 2) is incapable of self-care; 3) has an FMLA-defined "serious health condition"; and 4) has a doctor certify that the parent is needed to care for the child.***

1) has a disability as defined by the [Americans with Disabilities Act] ADA;
2) is incapable of self-care due to that disability;
3) has a serious health condition; and
4) is in need of care due to the serious health condition …."

It is only when **all** four requirements are met that an eligible employee is entitled to FMLA-protected leave to care for his or her adult son or daughter.

ADA Disability and FMLA "Serious Health Conditions"

As interpreted by the Equal Employment Opportunity Commission, the ADA definition of disability is a physical or mental impairment that substantially limits a "major life activity." This differs from the FMLA's definition of a "serious health condition," for which an employee is entitled to take FMLA leave to care for an adult child incapable of self-care. A serious health condition is defined by statute and regulations in a rigid and often counter-intuitive manner. It is defined as an illness, injury, impairment, or physical or mental condition that involves "inpatient care" in a hospital or "continuing treatment by a health care provider." These include conditions requiring an overnight stay in a hospital; conditions that cause the patient to be incapacitated for more than three consecutive calendar days and that require ongoing medical treatments; chronic conditions that cause occasional periods of incapacity and that require treatment by a health care

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Hot Topics

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provider; and incapacity due to pregnancy.

In our initial example, the employee's adult daughter clearly has a serious health condition, i.e., incapacity due to pregnancy. But she does not necessarily have a disability as defined by the ADA.

The Interpretation notes that the ADA includes examples of major life activities that, if impaired, are recognized as disabilities, such as "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." The definition also includes impairments involving the "operation of a major bodily function," such as "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, … [etc.." The Interpretation goes on to say that "while pregnancy itself is not a disability under the ADA, pregnancy-related impairments, such as gestational diabetes, may be disabilities within the meaning of the ADA if they substantially limit a major life activity."

Since the employee's daughter, in our example, has a pregnancy-related impairment requiring two months of bed rest, her condition would most likely satisfy the definition of disability under the ADA.

Child Incapable of Self-Care Due to Disability

The FMLA regulations define "incapable of self-care" to mean that "the individual requires active assistance or supervision … [for] self-care in three or more of the 'activities of daily living' (ADLs) or 'instrumental activities of daily living' (IADLs)." Activities of daily living include "activities such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating. Instrumental activities of daily living include cooking, cleaning, shopping … using telephones and directories… etc."

In the example, the employee's daughter is not permitted to leave her bed for two months. Accordingly, she will need active assistance and supervision with respect to hygiene, bathing, dressing, as well as cooking, cleaning, shopping, etc. Thus, the daughter would meet the test of being incapable of self-care due to her disability. But that is not the end of the inquiry.

Child In Need of Care from Parent

While we have already established that the daughter has a serious health condition as defined by the FMLA (i.e., incapacity due to pregnancy), the question then becomes whether your employee is entitled to FMLA leave to care for that daughter because she is "in need of care" from the parent.

In our example, the daughter is married and her husband is available to help care for her. Is your employee therefore "needed?" This question must be answered by a physician.

The parent may be needed to care for his or her adult son or daughter if, for example, due to the serious health condition the adult child is "unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor." However, the phrase "needed to care for" also includes providing "psychological comfort and reassurance" that would be beneficial to a son or daughter with a serious health condition who is receiving inpatient or home care.

Whenever an employee requests leave of this nature, employers should (as a matter of course) have the employee obtain a medical certification from the patient's attending physician. The medical certification form for care of an immediate family member (available online at http://www.dol.gov/whd/forms/WH-380-F.pdf) requires the attending physician to "[e]xplain the care needed by the patient and why such care is medically necessary."

Applying this standard to our example, if, in the physician's opinion, the daughter would be psychologically comforted by having her parent present, the parent is technically "needed to care for" the daughter. Stated differently, even though the daughter's husband is available to assist with her care (even if he was available at all times to care for the adult daughter), when the doctor certifies that the daughter would be psychologically comforted by the presence of the parent, the criteria for FMLA leave eligibility is met. In our experience helping clients with these issues, we have found that more often than not, this is not a difficult criteria for employees to meet.

Conclusion

While an employee must satisfy all four criteria described above in order to be entitled to take an FMLA leave to care for an adult child, our example illustrates that these criteria may be met fairly easily. Nevertheless, work closely with your employment lawyer when faced with these requests to verify that each has been met. Every request must be reviewed independently based on its unique facts. Given that the penalties for FMLA violations can be severe and permitting extended leaves when you are not legally required to do so can lead to costly staffing and production problems, it is important to make the right decision in these matters. If you have any questions about the foregoing, please feel free to call our office.

New York Minimum Wage

New York's Minimum Wage to Increase over the Next Three Years as will Uniform Maintenance Pay and Minimum Salary Requirements for Exempt Employees

New York's phased-in minimum wage increases will begin on December 31, 2013. As of that date, the minimum wage will increase from $7.25 per hour to $8.00 per hour. Annually thereafter, it will increase to $8.75 on December 31, 2014, and $9.00 on December 31, 2015.

Also on December 31, 2013, the New York Department of Labor (DOL) will begin enforcing its amended Minimum Wage Orders which affect allowances for uniform pay and the "minimum salary basis" for exempt status under New York law.

Uniform Maintenance Pay

As most employers are aware, if they require employees to wear uniforms, the employer must either launder and maintain the uniforms at no cost to the employee or pay the employees a specific amount above minimum wage each week to do it themselves. Beginning December 31, 2013, the amount employers must pay those employees will increase from $9.00 per week to $9.95 per week if the employees work more than 30 hours. For employees working between 20 and 30 hours, it will increase from $7.10 to $7.85 per week, and from $4.30 to $4.75 per week if the employees work 20 hours or less.

Like the minimum wage itself, these amounts will increase annually until 2015. By December 31, 2015, the uniform maintenance pay will be $11.20 per week for employees who work more than 30 hours, $8.85 per week for those working between 20 and 30 hours and $5.35 per week for those 20 hours or less.

Minimum Salary for Exempt Employees (Executive and Administrative Exemptions)

New York employers should also be aware that the salary thresholds needed to qualify for the executive and administrative exemptions from minimum wage and overtime requirements under State law will also increase over the next three years, beginning on December 31, 2013. Specifically, New York employers must pay exempt executive and administrative employees at least $600.00 per week (up from the current $543.75 per week). By December 31, 2015, that amount will be $675.00 per week

If you have any questions about the minimum wage increase, uniform laundering and maintenance pay or salary requirements for exempt employees, please feel free to contact us.

Reasonable Accommodations

"Indefinite Leave" Not a Reasonable Accommodation under State Human Rights Law but may be under NYC Human Rights Law, NY's High Court Rules

Let's say you have an employee who is out on leave for a disability-related reason and he/she sends you a doctor's note which states that the employee should continue on that leave "indefinitely." Do you have to accommodate that request? According to a recent decision from New York's highest court, the answer is "yes" (or perhaps, "maybe") and "no" depending on where your company is located in New York State. Highlighting the differences between the protections afforded employees under the New York State Human Rights Law and the New York City Human Rights Law; the Court ruled that such an accommodation (i.e., an indefinite leave of absence) could be considered "reasonable" under the City Law but not the State law. (*Romanello v. Intesa Sanpaolo, S.p.A.*, 22 N.Y.3d 881 (Oct. 10, 2013).)

In *Romanello*, Mr. Romanello was an executive employed in New York City who had been on paid medical leave for 4 1/2 months due to both physical and mental illnesses. When his employer, Intesa, inquired about his return, Romanello's attorney sent the employer a letter stating that:

> "[Romanello] has not at any time evidenced or expressed an intention to 'abandon his position' with [Intesa]. Rather, he has been sick and unable to work, with an uncertain prognosis and return to work date that is indeterminate at this time."

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Reasonable Accommodations

"Indefinite Leave" Not a Reasonable Accommodation under State Human Rights Law But may be under NYC Human Rights Law, NY's High Court Rules (cont'd)

Intesa responded by terminating Romanello's employment. Romanello then filed a lawsuit under the State and City laws alleging disability discrimination.

The New York State Court of Appeals dismissed Romanello's claims under the State Human Rights Law ("State HRL"). The Court noted that the State HRL's definition of "disability" is "limited to disabilities which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held" (Executive Law §292[21]). Accordingly, the Court ruled that:

> Indefinite leave is not considered a reasonable accommodation under the State HRL … Here, neither plaintiff's communications with his employer just prior to his termination nor the complaint filed one year later offer any indication as to when plaintiff planned to return to work. Instead, plaintiff informed his employer that he had not expressed any intention to "abandon" his job and that his return to work date was "indeterminate"; the complaint merely alleges that plaintiff sought "a continued leave of absence to allow him to recover and return to work." …. The only conclusion to be reached by plaintiff's own description of the circumstances is that he hoped to keep his job by requesting an indefinite leave of absence.

On the other hand, however, the Court of Appeals held that Romanello's claim under the City HRL was potentially valid. Unlike the State HRL, the City HRL's definition of "disability" does not include "reasonable accommodation" or the ability to perform a job in a reasonable manner. Rather, the City HRL defines "disability" solely in terms of "impairments." The City HRL requires that an employer "make reasonable accommodation to enable a person with a disability to satisfy the essential requisites of a job ... provided that the disability is known or should have been known by the [employer]" (NYC Administrative Code §8–107[15][a]). Once known, the City HRL obliges the employer to prove that the employee "could not, with reasonable accommodation, satisfy the essential requisites of the job."

Romanello, through the letter from his attorney, clearly made his disability known to his Employer. But Intesa did not plead and/or prove that Romanello could not perform his essential job functions with the accommodation requested. As such, the Court could not invalidate Romanello's City HRL claim.

The bottom line for employers in New York City is if you receive a request for an indeterminate or indefinite leave, make sure you document specifically how the employee will not be able to perform his/her essential job functions if the leave is granted. Such documentation could be in the form of a letter to the employee (carefully drafted in conjunction with your employment law attorney) rejecting the accommodation request and asking if there are any alternative accommodations to be considered. If no alternative accommodations can be found for the employee's disability and the leave remains indeterminate, the employee would not be protected from termination by either the State or City HRLs.

For employers located in New York but not subject to the City HRL, if you receive an indefinite leave request, the Romanello decision makes it clear that you can reject that request as it is not a "reasonable accommodation." However, there is other case law interpreting both the State HRL and the Americans with Disabilities Act that suggest that employers must do some investigating of possible alternative accommodations that are effective for the employee's disability before making a final decision that termination is the appropriate course of action. Like the employers subject to the City HRL, it would be prudent to carefully document that you attempted to elicit an alternative accommodation idea from the employee and/or other sources, before making any termination decision.

Feel free to call our office with any questions.

Restrictive Covenants

Restrictive Covenant and Trade Secret Violations Result in a Multi-Million Dollar Award to Former Employer

A Pennsylvania state court recently awarded the former employer of a group of insurance brokers $6.9 million for the group's violations of the post-employment restrictive covenants in their employment agreements and their new employer's misappropriation and use of its trade secrets. (See *B.G. Balmer & Co. Inc. v. Frank Crystal & Co.*)

The *Balmer* case involved a group of insurance brokers who violated the non-solicitation clauses in their employment agreements with their former employer B.G. Balmer & Co. Inc. The group of brokers all resigned from Balmer on the same day in order to start working for a competitor, Frank Crystal & Co. As a result of their departure, approximately 20 clients switched insurance brokers from Balmer to Crystal. Balmer sued.

Balmer argued that the group engaged in a deliberate scheme to harm Balmer's business by resigning on the same day and convincing a number of Balmer's clients to switch insurance brokers. Balmer also claimed that

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Restrictive Covenants

Restrictive Covenant and Trade Secret Violations Result in a Multi-Million Dollar Award to Former Employer (cont'd)

Crystal and the brokers misappropriated and used its trade secrets in the process (including, e.g., customer lists). Crystal and the group of former employees' argued that the clients chose to switch insurance brokers without any improper solicitation or trade secret violations.

After a long trial which began in 2011, the judge finally rendered the court's decision on June 28, 2013. The judge found that both Crystal and the employees should be held liable for nearly all of the claims asserted in Balmer's complaint. Based upon this finding, the judge not only awarded Balmer $2.4 million in compensatory damages, but also $4.5 million in punitive damages.

If you have any questions about restrictive covenants and trade secret protection or need assistance enforcing them, do not hesitate to call our office.

Staying Union-Free

"Labor Persuader" Rule Delayed Until March 2014

The U.S. Department of Labor recently announced it is delaying (until March 2014) the issuance of its final regulations which virtually eliminate the "advice exemption" to the Labor-Management Reporting and Disclosure Act (LMRDA). The proposed final rule will undoubtedly complicate open-shop communications by implementing significant new reporting requirements for employers as well as their consultants and attorneys.

The LMRDA has required (for more than 50 years) that employers report "any agreement or arrangement" where the object is "directly or indirectly, to persuade employees to exercise or not to exercise…the right to organize and bargain collectively..." (29 U.S.C. Sections 433(a)(4) and (b)(1)). However, during that 50-year timeframe, the DOL interpreted the LMRDA as exempting lawyers/consultants from the law's "persuader activities" reporting requirements when they provided services directly to employers, but had no direct contact with employees. This was known as the "advice exemption."

Under the proposed rule change, both employers and lawyers/consultants who provide advice to employer clients will have to file periodic disclosure reports, even if the lawyers/consultants have no direct contact with the employees. The proposed rule also expands the definition of "persuader" activities, to include such things as:

- Planning a response to a union campaign;
- Delivering draft communications for the employer to use;
- Training supervisors on how to comply with the laws/regulations applicable to defending against a union organizing campaign;
- Drafting or revising policies.

Given that the new rule will require lawyers/consultants to **publicly** disclose these agreements or arrangements within 30 days of their creation, union organizers will have plenty of time to use that information against employers in their organizing campaigns.

The regulations were originally proposed in July 2011. However, the finalization of the rule has been delayed on a number of occasions. Most recently, they were scheduled to be finalized in November 2013.

If you have any questions regarding the foregoing, feel free to contact us.

Minimum Wage Trends?

New Jersey Amends its Constitution to Add Automatic Minimum Wage Increases

With 61% of voters approving the ballot measure on November 5, New Jersey amended its state constitution to not only increase the state minimum wage from $7.25 to $8.25 an hour, but index future minimum wage increases to the rate of inflation. With this move, New Jersey becomes the fifth state in the Nation to include their minimum wage requirements in their state constitutions and the 11th to adopt automatic increases.

Under this new constitutional amendment, at the end of each September every year, the consumer price index (CPI) increase over the previous 12 months for all urban wage earners and clerical workers will be calculated. Any CPI increase will be added to the minimum wage, beginning the following January 1. For example, if the CPI increase is 3.5% between October 2013 and September 2014, the minimum wage would rise by $.29 to $8.54 (i.e., a 3.5% increase to the existing $8.25 minimum wage) beginning on January 1, 2015.

Whether or not this constitutional approach to minimum wage increases and/or automatic minimum wage increases tied to inflation in general will become a trend for other states to follow still remains to be seen.

If you have any questions, please call our office.