LawTrends

A publication of Eastman & Smith Ltd.

EASTMAN & SMITH LTD.
ATTORNEYS AT LAW
Established 1844

January 2010
Special Issue

The Evolving World of Workplace Absences as Affected by the Family Medical Leave Act and the Americans with Disabilities Act

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On October 28, 2009, President Obama signed the 2010 National Defense Authorization Act (2010 NDAA), which expanded the benefits available to military families under the Family and Medical Leave Act (FMLA).

FMLA benefits for military families were first adopted in 2008, allowing family members of participants in the Reserves or National Guard who have been called to active duty to qualify for protected leave for "qualifying exigencies." The Department of Labor (DOL) recently described this term as including:

- short-notice deployment;
- military events and related activities;
- childcare and school activities;
- financial and legal arrangements;
- counseling;
- rest and recuperation;
- post-deployment activities; and
- additional activities arising out of the covered military member's active duty or call to active duty status, provided the employer and employee agree that the leave qualifies and agree to the timing and duration of the leave.

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The 2010 NDAA grants family members of active duty participants in the Armed Forces FMLA exigency leave under the same circumstances as family members of participants in the Reserves or National Guard. The 2010 NDAA also eliminates the requirement that the service be in support of a contingency operation; the duty need only involve deployment to a foreign country.

Prior to the most recent amendments, the FMLA permitted family members to take 26 weeks of leave to care for injured service members. Family members are now also eligible for 26 weeks of leave to care for veterans who are undergoing medical treatment, recuperation or therapy for a serious duty-related injury or illness during the five years after active duty terminates.

Finally, the new law clarifies that covered injury or illness to a service member includes conditions aggravated while on active duty, not just incurred during active duty.

The newly-expanded FMLA rights became effective immediately in October 2009. While there may be little practical impact on the day-to-day administration of the FMLA, employers should revise existing policies and communicate any changes to their workforces.

The DOL will issue new FMLA rules to implement the 2009 NDAA, probably late in 2010. In the meantime, the DOL announced it also intends to review the FMLA regulations previously issued in January 2009. Those regulations implemented the 2008 NDAA and also provided new guidance to employees and employers on rights and obligations under the FMLA generally. You may recall that these regulations, among other things, provided clarification on the definition of a covered serious health condition, provided streamlined processes for gathering information from attending health care providers, changed the rules on attendance bonuses for employees using FMLA and offered guidance on the notice requirements for both employers and employees. The regulations are best known, however, for the revisions to existing FMLA model forms and the several new notice forms. There have been consistent complaints from employee advocates and labor organizations calling for a "repeal" of the new rules, which some consider too "employer friendly."

Simultaneously, legislators in Washington have introduced several proposed amendments to the FMLA, some of which would roll back the January 2009 regulations. Others which would eliminate the hours of service requirement (1750 hours); extend FMLA rights to grandparents, parent-in-laws, grandchildren, elderly relatives and same-sex spouses (regardless of state law); and extend leave to school/extracurricular activities of children and grandchildren, "parenting" ordered by court, routine illnesses and medical visits (including dental and vision exams) and victims of domestic violence or stalking. Given the outcry regarding the January 2009 rule changes, it is only a question of when, not if, further legislation and/or new rule changes are adopted.

In January 2009, Congress adopted the ADA Amendments Act of 2008 (ADAAA). This law, aided by pending rules issued by the Equal Employment Opportunity Commission (EEOC), dramatically expands the definition and scope of what is a disability, vastly increases the number of "disabled" employees in the workforce and encourages increased demand for accommodation in the workplace. While the FMLA and ADA are separate statutes aimed at different goals, recent developments have made it critical for businesses and organizations to have a single strategy for compliance. The changes in these laws place your supervisors and managers at grave risk of making misstatements, seeking too much (or the wrong) medical information, denying leave or disqualifying employees and making good-intentioned but inappropriate disclosures.

While we await new rules and legislation, it is important that policies and practices be updated to:

1. reflect the January 2009 DOL rules;
2. implement the October 2009 FMLA law; and
3. fully recognize the 2009 ADAAA and its renewed focus on the "interactive process."

It is also important that attendance policies be

1. evaluated to confirm that they actually address the needs and issues in your workforce (many are years or decades past being helpful);
2. updated to assure regulatory compliance;
3. revised to focus on the needs of your cooperative, dependable, productive and valued employees (as opposed to your problem employees); and
4. examined in anticipation of mandatory paid leave laws.

Should you wish to discuss these changes further, please contact the attorneys at Eastman and Smith Ltd.

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