

The East Texas Employment Law Update

A Bi-Monthly Publication Dedicated to Discussing Employment Law Issues.

May, 2009

2009 FMLA Amendments - Part One

As many of you are aware, new regulations were issued by the Department of Labor (DOL) effective January 19, 2009 pertaining to the Family Medical Leave Act (FMLA). These amended regulations were made necessary primarily by National Defense Authorization Act of 2008 which mandated FMLA leave for employees with family members in the military. The DOL also used the opportunity to attempt to clarify some uncertainties in the regulations. What will follow in likely two or more part (issues) are explanations for specific areas of the 2009 changes to the FMLA regulations. The focus of this part one will be on some of the non-military related changes to the FMLA.

Employee Notification of Leave:

An employee is now required to timely notify an employer of their need for leave. This applies to both foreseeable and unforeseeable leave. The regulations also provide that leave can be denied or delayed if it can be shown that the employee did not notify the employer of the need for leave when they first knew of the need for leave.

Authorization to contact Employee Health Care Providers:

Employees are now required to provide the necessary authorization for employers to contact health care providers to determine the authenticity of leave certification documents. The employer is also permitted to inquire into the seriousness of the employee's condition to determine if it actually qualifies for FMLA leave.

Employee responsibility to provide certification:

The DOL clarified the regulations to require the employee to provide the necessary documentation to qualify for leave. In essence, there is no longer an ambiguity in this area of the regulations.

Employer must identify where a certification is deficient

The DOL regulations make clear that an employer is now required, when denying leave, to identify where a certification presented by an employee is deficient. A wise employer should treat these notices of deficiencies like ERISA plan denial letters and make sure to spell out clearly and in simple terms where the certification is deficient.

Employer Designation of Leave as FMLA must:

- Be in writing
- State if the leave is non-qualifying FMLA leave and why it fails to qualify
- The amount of leave, to the extent known at the time, that will be credited against entitlement
- Any rules which require substitution of paid leave for unpaid FMLA leave
- Any fitness for return to duty requirements that must be met prior to returning to employment
- If relevant, a list of the essential functions of the employee's position.

Scheduling of Intermittent leave:

DOL regulations now require employees to make an effort to schedule intermittent or reduced schedule leave in a manner so as to not disrupt or cause as little disruption to business operations as possible. An example of an applicable situation is when an employee or family member is having elective surgery or planned surgery. Communication between the employer and employee about when the best time to have the surgery falls under this new requirement.

Analysis:

The amendments listed above seem to focus on requiring an employer and employee to communicate and play fair. In essence, an employee now must notify an employer as soon as FMLA is known and must also schedule leave in a manner which disrupts the employer's business as little as possible. Likewise, an employer is now required to clearly communicate requirements of FMLA, deficiencies in certification and rules which apply to FMLA leave. Employers need to review their employee manuals and policy and procedure manuals to make sure they are in compliance with the new regulations and provide an employer the ability to take advantage of the new regulations.

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