Proposed Changes to the Family and Medical Leave Act

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The federal Family and Medical Leave Act (“FMLA”), which applies to employers with 50 or more employees, is designed to help employees balance personal and family obligations by allowing them to take job-protected leave for certain qualifying reasons. Recently, the U.S. Department of Labor (“U.S. DOL”) proposed additional changes to incorporate legislative changes to the FMLA.

If the regulations are adopted, implementing the changes will be particularly challenging in California. A similar state law, the California Family Rights Act (“CFRA”) applies to many leaves protected by the FMLA, and the two laws are not always the same.

Military Caregiver Leave

The FMLA enables employees may take up to 26 workweeks of leave annually to care for a family member who suffers an injury or illness in the line of duty (“military caregiver leave”). The proposed regulations will incorporate 2010’s National Defense Authorization Act (“NDAA”), which (among other things) expands the definition of “serious injury or illness.” It also allow employees may take military caregiver leave to care for veterans discharged within the five preceding years, and to take leave for an injury or illness that predates active duty but was exacerbated by military service. Finally, the NDAA permits civilian health care providers to complete medical certifications for military caregiver leaves. An employer seeking a second or third opinion, which the FMLA permits when the employer has reason to doubt the validity of the certification, may also utilize a civilian health care provider, if a civilian health care provider completed the initial certification.

In most instances, military caregiver leave will run concurrently with CFRA leave for the first 12 weeks (which has a 12 week maximum). To qualify for CFRA, the family member need only have a “serious health condition” that “warrants the participation” of the employee in providing care. Also, CFRA regulations prohibit employers from obtaining second or third opinions for family members. So, these changes will not have significant impact if CFRA leave and military caregiver leave run concurrently.

Qualifying Exigency Leave

The FMLA also extends leave for certain “qualifying exigencies” associated with a family member’s deployment in the military, such as arranging childcare or financial or legal matters. The NDAA extended qualifying exigency leave from only families of Reserve or National Guard servicemembers to regular servicemembers, too, but limits qualifying exigency leave by specifying that the family member must be deployed to a foreign country. Also, the NDAA expanded the amount of time an employee may take to be reunited with a servicemember during “rest and recuperation” periods from five days to 15 days. Again, the proposed regulations will incorporate these provisions.

Because there is no “qualifying exigency” leave under CFRA, California employers must follow the FMLA regulations if they are implemented.

Leave for Airline Flight Crews

The proposed regulations also implement changes to the Airline Flight Crew Technical Corrections Act (AFCTCA). Prior to the AFCTCA changes, flight crews had difficulty meeting FMLA eligibility requirements, which require working 1,250 hours in the previous 12 months. Under the AFCTCA, flight crews are eligible for FMLA if they work not less than 60% of the monthly hours guaranteed to them by the airline, or if they have worked or been paid for not less than 504 hours during the previous 12 months.

Because CFRA also has a 1,250 hours requirement, flight crews in California may qualify for FMLA, but not CFRA. Also, other employees in the airline industry will still be subject the 1,250 hours requirement. So for employers in the airline industry, tracking leave eligibility will be more complicated.
The U.S. DOL also proposed changes regarding calculating increments of leave for employees who are physically unable to return to work when intermittent leave concludes in the middle of a shift, such as flight crews. Although the entire shift counts as FMLA leave, the proposed changes emphasize the rule apples in “limited circumstances” when it is “physically impossible” for the employee to be restored to work.

Genetic Information Nondiscrimination Act

The Genetic Information Nondiscrimination Act (GINA) limits an employer’s ability to obtain information about an employee’s “genetic information” and imposes certain obligations on employers to maintain genetic information confidentially. The proposed FMLA regulations remind employers that these requirements may apply to information obtained in connection with FMLA leave.

Surprisingly, the U.S. DOL recently extended use of its standard medical certification forms to 2015, although the proposed changes remove the forms from the regulations. (The forms expired last year.) The forms do not include “safe harbor” language employers should provide to health care providers under GINA, indicating that it is not seeking genetic information.

California more strictly limits the medical information an employer may obtain in connection with a CFRA leave. To comply with state and federal requirements, California employers should use California-compliant forms that include the GINA “safe harbor” language.

Calculating Increments of FMLA Leave

The FMLA regulations permit employers to track FMLA in the smallest increments used to track other forms of leave (such as an hour), which reduces administrative hassles when tracking intermittent (versus continuous) leave. However, the U.S. DOL reasons that the process requires employees to take more leave than they need, so the proposed regulations would specify that employers cannot require employees to take more FMLA leave than is necessary. The regulations would also require employers to calculate leave using the employer’s shortest increments of any form of leave.

What Employers Should Do

The proposed FMLA regulations will likely be finalized later this year. Employers must carefully review each request for FMLA leave to ensure compliance with state and federal law. Because leave may qualify as FMLA and CFRA eligible, employers must follow both sets of rules and seek assistance as needed.