Family Medical Leave Act – Some Things You Should Know

Many agents and brokers may think that by staying small they will avoid at least some of the Federal laws and regulations governing the workplace. That is true, generally. But even some laws, like the Family Medical Leave Act ("FMLA" to those who encounter it regularly) with moderately high thresholds, 50 or more employees, have exceptions that may catch you.

What does FMLA cover anyway: serious injuries

The Family and Medical Leave Act of 1993 requires all employers with at least 50 individuals at worksites within a 75 mile radius of one another to grant 12 weeks of leave without pay during every 12 month period to any employee who is:

1) disabled by a serious health condition

2) responsible for the care of a spouse, son or daughter who has such a condition

3) cares for a child born to or placed with the employee during the past year.[1]

A serious health condition is one which involves an inpatient hospital stay and period of incapacity that requires more than three calendar days absence from work, an incapacity due to pregnancy or a chronic serious health condition, incapacity that is long-term and treatment may not be effective, or multiple treatments for a condition that would result in the above incapacity, if left untreated.

You must have 50 or More Employees, but There is a Catch

Many insurance agencies may have less that 50 employees, and be exempt from FMLA, but if you have related businesses you may cross the number threshold and not be aware of it. The two concepts that govern this are:

1) Integrated Employer

Even if you have separate businesses, e.g., an agency devoted to property and casualty and then a separate one devoted to financial services, they may be considered to be an "integrated employer" under the FMLA. Some of the factors considered are: common management, the interrelation between operations, whether there is centralized control of labor relations, the degree of common ownership. So if you have two businesses that you and others own together and you share certain

operations, e.g., payroll, for economies of scale, you would have to count the employees in each one toward the fifty employees for FMLA.

2) Joint Employer

The joint employer concept focuses more on the employee. For example, if you hire temporary employees, but control their work, they would be counted toward FMLA.[2] If the two operations shared a worker, this would likely be considered joint employment. But, as with the integrated enterprise concept, the relationship in its totality has to be considered, not just one factor.

The Employee has to Give You Notice of a Serious Health Condition

Employees eligible for FMLA leave must still provide their employer a minimum of 30 days notice for a request to take leave under the FMLA when the requested leave is foreseeable. The various medical conditions protected by the FMLA ranging from incapacity due to pregnancy to multiple treatments for physical therapy appointments can be create uncertainty in the frequency of leave needed and the duration of absence. In such circumstances, the employee need only provide the employer verbal notice "as soon as practicable" when the leave is not reasonably foreseeable.[3] Notice requirements for leave vary from state to state but can provide protection for notice given several days before the requested leave period to notice given only one day prior to the requested leave period.

Intermittent Leave Can Cause Some Confusion

Employers should be mindful that leave requests under the FMLA for treatment of a serious health condition do not have to span a large time period. FMLA leave can be provided "intermittently" or on a reduced leave schedule. The FMLA additionally allows an eligible employee to use intermittent leave for medical appointments that are necessary for the treatment of a serious health condition. An employer is not expected to accommodate a single employee to the detriment of its business so the employee has to make reasonable efforts to avoid disrupting the employer's operations for the necessary appointments. An employer can then deduct the various work absences from the twelve weeks of unpaid leave provided under the FMLA.

While routine doctors appointments do not qualify for intermittent leave, the Act places the burden on the employer to make further inquiries into a leave request when an employee gives sufficient notice of a medical need for intermittent leave[4]. As a precautionary measure, employers may request medical documentation from the employee's treating physician within two days of the employee's return to work to assure that the leave was for a serious health condition. An employer can protect itself from

liability for terminating a qualified employee that needs recurring periods of leave by transferring the employee to an alternative position with equivalent pay that is better suited to accommodate the employee's need for recurring leave.

Conclusion

Employers should be reminded that FMLA leave is meant to be a floor rather than a ceiling for the minimum standards of employment. An employer's intent in applying the principles of the Act will not shield it from liability for violations of the FMLA. As the U.S. workforce continues to grow and become more diversified, an employer should take a proactive stance in applying personnel policies to shield itself from liability.

Please contact Mel Mobley or Dawn Pettigrew of Lokey, Mobley and Doyle, LLP (8425 Dunwoody Place; Atlanta, Georgia 30350) if you have questions about these issues.

---

[1] Shawe and Rosenthal, Employment Law Deskbook.

[2] Whether or not an independent contractor, e.g. a producer, is considered an employee will be covered in another article.

[3] 29 CFR 825.302.

[4] 29 CFR 825.302(c); *Johnson v. Primerica*, 1996 U.S. Dist. LEXIS 869 (S.D.N.Y. Jan. 30, 1996).

© 2007 Lokey, Mobley and Doyle, LLP. All Rights Reserved.