



King & Ballow

The 'New FMLA' – One Year Out Breakfast Briefing

January 8, 2010

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Welcome to the January 8, 2010 Breakfast Briefing presented by the law firm of King & Ballow in Nashville, Tennessee. Today's Breakfast Briefing will discuss new FMLA regulations. Log onto www.kingballow.com for more information on the next Breakfast Briefing or our past Breakfast Briefings.

I am Howard Kastrinsky, your host for this morning's Breakfast Briefing and the partner-in-charge of King & Ballow's Employment Discrimination Section.

Today, I will discuss new types of FMLA leave, employer coverage changes, employee eligibility changes and employer notice changes. Angelita Fisher, a partner with King & Ballow, will discuss employee notice obligations, new rules for defining a serious health condition, medical certification changes, and intermittent leave changes. We will finish out the morning discussing some potential issues for 2010.



Recent Developments

- COBRA subsidy extended.
- Outback Steakhouse to pay \$19 million for 'Glass Ceiling' discrimination.
- Court awards local employee \$1 million for racial and sexual harassment.
- Comprehensive Immigration law reform proposed.
- Labor law reform is coming. Really.



New Types of FMLA Leave

Presented by:
Howard Kastrinsky



New Types of FMLA Leave

- Care for covered service member
- Qualifying exigency
- 2009 Amendments expand "military" leaves



Serious Injury or Illness

- The term “serious injury or illness” is defined as “an injury or illness incurred by the member in line of duty while on active duty in the Armed Forces that may render the member medically unfit to perform the duties of the member’s office, grade, rank or rating.”
- FMLA Amendment does not use the FMLA term “serious health condition”; rather, it uses the term “serious injury or illness.”



“Next of Kin”

- Means nearest blood relative:
 - Use Department of Defense’s (DOD) order of such: (1) surviving spouse; (2) children; (3) parents; (4) remarried surviving spouses, etc.



Limits on Leave

- If an employee is granted leave for both “related servicemember undergoing medical treatment” and “qualifying exigency,” employee is limited to a total of 26 workweeks.



“Any Qualifying Exigency”

- There must be nexus between eligible employee's need for leave and service member's active duty status;
- Limited to non-medical related exigencies, such as arrangements for child care; financial and legal arrangements to address absence; and attendance at official ceremonies or programs where military requests family member's participation.



October 28, 2009

Amendments

- Expanded to allow for Exigency leave for **active duty** of employee's parent, child, or spouse.
- Previous: only allowed for family members called up to active duty from the National Guard or Reserves.



October 28, 2009

Amendments

- Allows employees to take leave to care for a **veteran** who is a member of the regular armed forces, National Guard, or reserve at any time during the **five** years proceeding the date on which the veteran undergoes medical treatment, recuperation or therapy or a serious illness or injury



October 28, 2009

Amendments

- Expands military caregiver leave to cover the **aggravation** of existing or pre-existing injuries incurred in the line of duty while on active duty



Effects of New FMLA Leave

- Employer Policies



Employer Coverage Changes

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50 or More Employees

- 50 or more employees during 20 or more calendar weeks in current or preceding calendar year



Clarification on “50 or More”

- When an employee is jointly employed by two or more employers, the employer’s worksite is the primary employer’s office from which the employee is assigned or reports, unless the employee has physically worked for at least one year at a facility of a secondary employer, in which case, the worksite is that location.



Joint Employers

- Where two or more businesses exercise some control over the work or working conditions of the employee, the businesses may be joint employers.



Clarification on Joint Employers

- Professional Employer Organizations
 - Contracts with clients to provide administrative functions such as payroll, benefits, regulatory paperwork, etc.
 - Generally, a PEO is not a joint employer unless they have the right to hire, fire, assign, or direct and control the client's employees or benefits from the work the employees perform.



Employer Coverage Changes

- Effect on employers



Employee Eligibility Changes

Presented by:
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Employee Eligibility Changes

- Basic eligibility
 - 12 months of employment
 - 1,250 hours in past 12 months



Employee Eligibility

- 12 months of employment need not be consecutive
- Break in service of less than 7 years must be counted
- Break of 7 years or more not counted unless due to:
 - Military obligations;
 - Written agreement, including CBA with intent to rehire;
 - Employee maintained on payroll on paid or unpaid leave and some benefits provided; and
 - Employer chooses to recognize prior service.



Military Service

- FMLA regulations now state time spent fulfilling employee's military obligations count toward 1,250 hour and 12-month requirements.
 - Necessary under USERRA



Ineligible Employees Cannot be “Deemed” Eligible

- Due to Supreme Court’s decision in *Ragsdale v. Wolverine World Wide* (2002), DOL deleted regulation that employee could be deemed eligible by employer even though do not meet the requirements.



Employee Eligibility Changes

- Meaning for Employers
- Hours worked from home for Comp time count toward 1250 hour threshold.
 - Erdman v. Nationwide Insurance Co, 3rd Cir. September 23, 2009



Employer Notice Changes

Presented by:
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Changes to Employer Notice Obligations

- General Notice
- Eligibility Notice
- Rights and Responsibilities Notice
- Designation Notice



General Notice Requirements

- Posting where easily seen by employees, applicants
- Included in handbook (paper and electronic)
- Required even if no FMLA – eligible employees
- WH publication 1420



Notice Posting and Handbooks

- An employer that fails to post a notice cannot take an adverse action against an employee for failing to notify his employer of his need to take FMLA leave.



Eligibility Notice Requirements

- Notify employee of FMLA eligibility within five business days from request for leave or from date employer gains knowledge leave may be for FMLA – qualifying reason
- If not eligible, must give at least one reason
- Oral or in writing (WH-381)
- Subsequent leave requests during “year” do not require second eligibility notice – if eligibility has not changed
- Five days to notify if change in eligibility



Rights and Responsibilities Notice

- To accompany each eligibility notice
- May use WH-381 form
- Must tell employee that employer may designate and count leave toward FMLA entitlement of qualifying



Rights and Responsibilities Notice (cont.)

- Must tell employee about right to substitute paid leave
- Must tell employee whether employer will require paid leave substitution
- Must tell employee of entitlement to take unpaid leave if employee does not meet paid leave requirements



Rights and Responsibilities Notice (cont.)

- Provide appropriate certification form
- Provide at least 15 days to return form
- State consequences of failing to provide certification.



Designation Notice

- Must be in writing
- Inform employee whether leave is FMLA – qualifying
- Inform employee that leave will be designated as FMLA – qualifying
- Provide within five business days after receiving sufficient employee information



Designation Notice (cont.)

- Advise employee whether employer will substitute paid leave
- Advise employee whether paid leave will be counted as FMLA leave
- Must notify employee of any fitness-for-duty certification requirement



Designation Notice (cont.)

- If fitness-for-duty required, description of essential job functions must be included to be given to doctor
- Provide notice of amount of leave counted against FMLA entitlement
- May use WH-382 form
- One designation notice for each FMLA-qualifying reason per "year"



Retroactive Designation

- Employees must “demonstrate harm as a result of employer’s failure to provide notice of eligibility or designation of FMLA leave.” If there is no such harm, retroactive designation is permissible under the FMLA. Also, the employer and employee may agree on retroactive designation.



Employer Notice Changes

- Effect on Employers
- Employee needs to rely on false statement that he was eligible for FMLA
 - Dobrowski v. Jay Dee Contractors, Inc
6th Cir. July 8, 2009
- Protected leave may begin before 12 month threshold is met.
 - Hearst v. Progressive Foam Technologies
E.D. Ark. August 20, 2009



Employee Notice Obligations

Presented by:
Angelita Fisher



New Employee Notice Rules

- DOL declined to require employee to mention FMLA or give written notice
- New Regulations require:
 - An indication that a condition renders the employee or family member unable to work;
 - The anticipated duration of the absence; and
 - Whether the employee or family member intends to visit a health care provider.



Customary Notice Policies

- New Regulations:
 - Require employees to provide notice as soon as practicable and comply with the employer's usual procedures for calling in and requesting leave....except where unusual circumstances exist.



Customary Notice Policies (cont.)

- If the employee fails to comply, the FMLA leave may be delayed.
- Require employees to follow established policies when seeking to substitute paid leave.



Notice for Same Condition

New Regulations:

- If seeking FMLA leave for the same serious health condition for which FMLA was previously taken, employee must mention prior FMLA or serious health condition that is certified. "I'm sick" is not enough.



Employee Notice Obligations

- **Employees must follow established call-in procedure.**
 - **Nelson v. Wayne State University**

U.S. District Court E.D. Mich. November 13, 2009
 - **Allen v. Butler County Commissioners**

6th Cir. August 18, 2009
 - **Bishop v. New Process Gear, Inc.**

N.D. New York, November 18, 2009



Employee Notice Obligations

- Employee did not provide sufficient notice of intent to take leave.
 - Moore v. Ill. Department of Corrections, S.D. IL, December 16, 2009



New Rules for Serious Health Conditions

Presented by:
Angelita Fisher



Continuing Treatment

- The new rules do not materially change the substance of the definition of serious health condition, but do modify the time period in which “continuing treatment” following a period of “incapacity” must take place and the frequency of “periodic treatment” for chronic conditions.



Absence due to incapacity + treatment

- The definition of “continuing treatment” is satisfied if, in connection with a period of incapacity of more than three consecutive full calendar days, the employee or family member has **one visit** to a health care provider **and** undergoes a regimen of **continuing treatment**, such as a course of prescription medication, **or two visits** to a health care provider.



Two Visits

- New: Two visits must take place within 30 days, absent extenuating circumstances.
 - 30 day period begins on first day of incapacity
 - First visit must occur within 7 days of the first day of incapacity
 - Extenuating circumstances are those outside of the employee's control which prevent follow-up treatment from occurring.



Period of Incapacity

- The new rule clarifies that the period of incapacity must be more than three consecutive “full” calendar days.



Chronic Conditions

- For chronic conditions, periodic treatment means visiting a health care provider at least two times in one year for the same condition.
- The determination as to whether two treatment visits per year are necessary is a medical determination to be made by the health care provider.



Serious Health Condition Changes New Cases

- Absences because of alcohol use are not covered under FMLA
 - *Scobey v. Nucor Steel-Arkansas*, 8th Cir. August 25, 2009
- Employer needs only to have honestly held belief employee made misrepresentations about health condition.
 - *Weimer v. Honda*, 6th Cir., December 14, 2009
- Employer does not have to assume FMLA every time an employee misses work because of illness.
 - *Crown v. Nissan North American, Inc.*, S.D. Mississippi June 8, 2009



Medical Certification Changes

Presented by:
Angelita Fisher



Certification Forms

- Employee's serious health condition
- Family member's serious health condition
- Qualifying Exigency for military family leave
- Serious injury or illness of covered servicemember for military family leave



Initial Medical Certification

- Employer may require medical certification of need for leave
- Employer must provide written notice of certification requirement (rights and Responsibilities Notice)
- Advise employees within five days after notice of leave or start of leave if unforeseen



Employer Notice Obligations

- Employer must state in writing consequences of failing to provide certification to employer
- Written employer notice not required if employee has been given required written notice in past 6 months



Recertification

- For conditions lasting longer than 30 days (but less than one year)—must wait until minimum duration has passed
- For conditions lasting longer than one year—each leave year
- For ongoing serious health conditions—every six months in conjunction with an absence
- Exception—“changed circumstances”



Incomplete or Insufficient Certifications

- Incomplete—one or more entries have not been completed
- Return incomplete certification to employee
- Specify in writing what needs completing
- Give employee seven calendar days to cure deficiency



Incomplete or Insufficient Certifications (cont.)

- Insufficient—information is vague, ambiguous or nonresponsive
- Specify in writing what is insufficient
- Given employee 7 calendar days
- Consequences if employee does not return form



Contacting the Health Care Provider

- For *clarification* or *authentication*
- With employee's permission
- What if the employee refuses to sign authorization?
- Deny leave for failure to consent (29 CFR 825.307(a))



Authentication

- Verification of information provided in certification
- Confirming it was authorized by signing health care provide
- May not ask for additional medical information



Clarification

- To better understand meaning of response
- To translate illegibilities



Who May Ask

- Health care provider, HR professional, leave administrator, manager
- Not direct supervisor
- May not ask for information beyond what is required for certification



Second and Third Options

- Not allowed to contest medical propriety of certification
- Employee must authorize release of relevant medical information to allow second, third opinion to take place



New Certification Form & Rules

- Effect on Employers
- Recertification for intermittent leave may be requested every six months. Also, employer may directly contact health care provider to authentic certification form.
 - Rhynes-Hawkins v. Potter, W. D. TN, December 15, 2009



Intermittent Leave Changes

Presented by:
Angelita Fisher



Intermittent Leave

- FMLA leave taken in separate blocks of time due to a single qualifying reason
- Reduced leave schedule is a leave schedule that reduces an employee's usual number of working hours per workweek or hours per workday



“Reasonable Effort” to Schedule Treatments

- Employees must make a “reasonable effort” to schedule treatment so as not to cause undue disruptions to the employer’s operations.
- Prior Regulation: required employees to “attempt to schedule their leave so as to not disrupt the employer’s operations.”



Temporary Transfers

- The new regulations clarify that temporary transfers are allowed for employees taking planned intermittent leave only.
- The DOL declined to expand temporary transfers to unplanned, unscheduled or unforeseeable intermittent leave.



Timekeeping

- New regulation clarifies that accounting for leave need not be in the smallest increments that the employer's timekeeping system can handle, but rather in the smallest increments the employer accounts for in other types of leave, provided it is not greater than one hour.



Timekeeping

- The DOL will accept policies which charge employees at different increments at different points in time.
- Example: First hour of shift is calculated in one-hour increments (to discourage tardiness), in which case, a full hour of FMLA leave could be charged. However, the employee could not work during any part of that hour.



Physical Impossibility Exception

- If unique nature of worksite keeps employee from returning for a partial shift/workday, the entire period of absence should be considered protected.
- This is a narrow exception, applicable only to situations where an employee is physically unable to access the worksite after the start of the shift, or depart from the worksite prior to the end of a shift.



Calculating Leave

- When an employee works a schedule that varies so much from week-to-week that no normal schedule or pattern can be determined, average the prior 12 months to determine an actual workweek.
- Previously, you averaged the prior 12 weeks.



Calculating Leave (cont.)

- If employee was normally required to work overtime but is excused for FMLA-qualifying reason, overtime hours not worked may be counted as FMLA leave.
- Leave calculated on “percentage of workweek basis.”



Calculating Leave (cont.)

- If employee was normally required to work overtime but is excused for FMLA-qualifying reason, overtime hours not worked may be counted as FMLA leave.
- Leave calculated on “percentage of workweek basis.”



Other Interesting New Cases

- Employer's announcement that employee had miscarriage did not violate FMLA.

- Walker v. Gambrell

D.C. Maryland July 16, 2009

- Employee need not return to same job he left.

- Stroud v. Connor Concepts, Inc.

M.D. Tenn. Dec. 2, 2009



Upcoming Issues

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Issues for 2010

- What will be the effect of FMLA designations on ADA statuses?
- Will extensions of FMLA leave be required as a reasonable accommodation?
- Does GINA conflict with the need for certification of a serious health condition of a family member?



Questions &

Answers