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THE FAMILY AND MEDICAL LEAVE ACT:

FREQUENTLY ASKED QUESTIONS FOR PUBLIC SECTOR EMPLOYERS

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Although the federal Family and Medical Leave Act ("FMLA") was first enacted over twenty years ago, employers routinely confront challenging questions when complying with their obligations under the FMLA. While the goals of the FMLA are laudable, extended employee absences, for whatever reason, can create hardships on employer day-to-day operations. Even in the event of a hardship, however, the FMLA does not excuse covered employers from compliance. As all public employers, regardless of size, are covered by the FMLA, it is important that public employers understand their responsibilities under the law. Below are some frequently-asked questions in connection with FMLA leaves of absence.

1. What is a "serious health condition"[1] under the FMLA?

A "serious health condition" is defined by federal regulations (29 CFR §825.102; 29 CFR §825.113) as:

> an illness, injury, impairment or physical or mental condition that involves inpatient care as defined in [29 CFR] §825.114 or continuing treatment by a health care provider as defined in [29 CFR] §825.115. Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not serious health conditions unless inpatient hospital care is required or unless complications develop. Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions provided all the other conditions of this regulation are met. Mental illness or allergies may be serious health conditions, but only if all the conditions of [29 CFR] §825.113 are met.

A condition for which the employee has at least an overnight stay in a hospital, hospice, or residential medical facility, would be considered a serious health condition. 29 CFR §825.113; 29 CFR §825.114. In the absence of a hospital or other qualifying in-patient stay, a serious health condition is also present where the employee is incapacitated for <u>three consecutive, full, calendar days</u>, and receives "continuing treatment" by a health care provider, <u>including at least one in-person visit</u> with a health care provider within seven days of the first day of incapacity. 29 CFR §825.115. Any period of incapacity due to pregnancy or pre-natal care is a serious health condition. 29 CFR §825.115(b). Chronic conditions, which cause episodic rather than continuing periods of incapacity, like asthma and diabetes, are considered serious health conditions, so long as the condition requires periodic visits (at least two a year) to a health care provider. 29 CFR §825.115(c). Permanent or long-term conditions, like Alzheimer's, recovery from a severe stroke, or terminal stages of a disease, are considered serious health conditions, even where the employee is not receiving active treatment by a health care provider. 29 CFR §825.115(d).

[1] Military-related leaves are covered by the "serious injury or illness" standard. The definition of a "serious injury or illness" is detailed, and can be found at 29 CFR §825.102.

Substance abuse may be considered a "serious health condition" under the FMLA. An employee may take FMLA leave to seek treatment for a substance abuse problem (or to care for a family member who is seeking treatment). 29 CFR §825.119. However, absences due to an employee's active substance abuse, rather than for purposes of seeking treatment, are not covered. Id. Moreover, the mere fact that an employee is seeking treatment for substance abuse does not preclude the employer from taking disciplinary action against the employee due to active substance abuse. 29 CFR §825.119(b). Of course, you should consult labor counsel before any adverse employment action is taken against an employee with a substance abuse problem. Unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraines, and routine dental or orthodontia problems, generally are not considered serious health conditions under the FMLA. 29 CFR §825.113(d).

2. Does the employer have any obligations under the FMLA in the absence of an express request from an employee for leave under the FMLA?

While an employee has an obligation to ask for FMLA leave, particularly in the event of a foreseeable leave of absence (see 29 CFR §825.302), failure of an employee to ask for FMLA leave does not absolve the employer of any obligations with respect to FMLA. The employee's request for leave need not specifically refer to the FMLA so long as other notification requirements are met and the absence is for an FMLA-qualifying reason. For instance, an employee may indicate that s/he will be out sick for an extended period of time for in-patient surgery and recuperation from same. Given that conditions that result in overnight hospitalizations are, by definition, serious health conditions, it is reasonable to expect that an employee undergoing in-patient surgery will be hospitalized overnight. The employer has enough information to believe that the employee may be eligible for FMLA leave. In that case, the employer ought to affirmatively correspond with the employee, indicating that the employee may be eligible for FMLA leave and providing the necessary paperwork for the employee to initiate a request for FMLA leave.

3. The employee does not want to be placed on FMLA leave. Can the employer designate a leave of absence as FMLA leave nonetheless?

Often a contentious issue, the employer has the right to designate an absence as FMLA leave as long as the leave is for an FMLA-qualifying reason, even if the employee does not affirmatively request FMLA leave, fails to return the necessary paperwork, or objects to being placed on FMLA leave. 29 CFR §825.301(a). The primary reason that an employer will want to designate leave as FMLA lease is so that the employee cannot extend the total amount of time absent from work, first by using any accrued paid leave time or an approved leave of absence without pay, and then by requesting FMLA leave. Particularly in the case of long-time employees with significant amounts of accrued leave, adding another twelve weeks of FMLA leave to an extended sick leave absence can create a hardship on the employer.

4. Must the employer approve an employee's FMLA leave request?

The answer depends on the facts at issue. An employer can reject a request for leave under the FMLA, if, for example, the employee fails to provide sufficient physician certification about the need for leave, the employee is ineligible due to insufficient hours worked in the preceding twelve months, the reason for the requested leave is not covered under the FMLA, or the employee has already exhausted available FMLA leave for the applicable twelve-month period. However, an employer may not deny an eligible employee's request for leave under the FMLA simply due to business needs or hardship to the employer.

5. Can the employer require a second opinion by a doctor of the employer's choosing if there are questions about the original certification provided by the employee?

An employer may require that an employee's leave, whether due to the employee's serious health condition or that of a family member, be supported by a certification issued by the employee's health care provider. If so required, the employee must provide a complete and sufficient certification within 15 calendar days or risk losing protection of the Act. If there are questions about information contained in the certification, the employer may contact the provider to request clarification or authentication. Be reminded that because there are numerous regulations concerning direct contact with an employee's health care provider, employers must proceed with due caution, and may wish to contact labor counsel prior to doing so.

FMLA regulations permit the employer to request a second medical certification from a provider of its own choosing and at its own expense. While the employer may choose the health care provider for the second opinion, in most cases the employer may <u>not</u> regularly contract with or otherwise regularly use the services of that health care provider. Where a second certification is requested, the employee is provisionally entitled to the Act's protections pending its completion. 29 CFR §825.307(b). If the opinions of the health care providers selected by the employee and the employer differ, the employer may require the employee to obtain certification from a third health care provider, which opinion is final and binding. The third health care provider must be designated or approved jointly by the employer and the employee, and be paid for by the employer. 29 CFR §825.307(c).

6. Can the employer require an employee to provide a fitness-for-duty certification as a condition of returning to work following an FMLA-designated leave of absence?

The employer may require an employee returning to work following an FMLA leave for their own serious health care condition to provide a fitness-for-duty certification. However, such a requirement may be imposed only if the employer maintains a uniformly-applied policy or practice for all similarly-situated employees (*i.e.*, same occupation, same serious health condition). A certification may only be sought with regard to the particular health condition that caused the employee's need for leave. Similar to the employee's original certification, the employer may request the employee's physician to clarify and/or authenticate the certification,

but doing so cannot delay the employee's return to work. Furthermore, the regulations do not permit an employer to request a second or third opinion of a fitness-for-duty certification. 29 CFR §825.312.

If the employer still has concerns over the employee's ability to perform their job duties, the employee may be required to undergo a medical examination at the employer's expense to determine whether the employee can perform the essential functions of the job, ***but only after the employee returns to work***. 29 CFR 825.312(h). Any such medical examination must be consistent with the limitations imposed by the Americans with Disabilities Act, in that the examination must be job-related and consistent with business necessity.

7. My employee has submitted a doctor's certification, signed by a nurse practitioner (or social worker, or chiropractor)? Must I accept that certification?

The federal regulations, 29 CFR §825.125, provide a lengthy list of "health care providers" who may provide certification of a serious health condition, as follows:

- doctors of medicine or osteopathy authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices;
- podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their practice under State law;
- nurse practitioners, nurse-midwives, and clinical social workers authorized to practice under State law and performing within the scope of their practice as defined under State law;
- Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts;
- any health care provider recognized by the employer or the employer's group health plan's benefits manager; and,
- a health care provider listed above who practices in a country other than the United States and who is authorized to practice under the laws of that country.

8. Must the employer adopt a written FMLA "policy"?

There is no legal obligation to adopt an FMLA "policy," and differing schools of thought exist as to whether adoption of a policy is advisable. In the absence of a policy, however, the employee has certain rights under the FMLA that may be less advantageous to the employer. For instance, the law provides different options for calculating the "12 month period" for purposes of determining an employee's eligibility for FMLA leave. In the absence of a uniformly-applied policy, however, the employer must use the method of calculating the "12 month period" that is most advantageous for the employee requesting the leave. 29 CFR §825.200(e). In contrast, the method often viewed as most advantageous for the employer is a "rolling" 12-month period measured backward from the date an employee uses FMLA leave. 29 CFR §825.200(b).

Similarly, the law also permits the employee to choose to utilize paid accrued leave time (with some limitations) concurrently with FMLA leave. However, the employer may, though a uniformly-enforced policy, require that the employee do so. While employees often choose to use paid leave time concurrently with FMLA leave, so as to continue to receive a paycheck during the absence, it may be to the employer's benefit to require use of concurrent paid leave so as to avoid a situation where an employee, through the consecutive use of accrued paid leave, can effectively extend an absence beyond the maximum 12 weeks (or 26 weeks, where applicable).

9. Should an employee's worker's compensation leave under G.L. c. 152 or injured-on-duty ("IOD") leave under G.L. c. 41, §111F also be designated as an FMLA leave (concurrently)?

While the facts of each situation must be reviewed separately, it is often the case that there is merit in designating a worker's compensation leave or IOD leave as an FMLA leave, provided that the injury at issue meets the definition of a "serious health condition" under the FMLA. This designation helps reduce the total amount of time an employee is able to be absent from work. Worker's compensation or IOD leaves can be lengthy, and sometimes disputes arise between the employer and employee about the employee's ability to return to work. For instance, an Independent Medical Examination ("IME") under G.L. c.152 may clear an employee to return to duty, but the employee or the employee's physician believes the employee is not ready to return, or can only return only with significant restrictions which the employer feels it cannot accommodate. If the worker's compensation leave was not previously also designated as leave under the FMLA, that employee could potentially use FMLA leave to add an additional twelve weeks to the existing absence.

10. How does the FMLA interact with the new Massachusetts Parental Leave Law (formerly the Massachusetts Maternity Leave Act)?

Both state law and the FMLA provide for leave for new parents. Notably, the applicable state statute has been amended, effective April 7, 2015, to extend parental leave benefits to both mothers and fathers. The term "maternity leave" is now more appropriately referred to as "parental leave." Eligibility requirements for FMLA leave differ from those for state parental leave, however. The most significant difference is that an employee must have been employed for at least twelve months and have worked at least 1,250 hours in order to be eligible for FMLA leave. In contrast, in order to be eligible for state parental leave, the employee need only have completed the first three months of his/her probationary period, or in the absence of a set probationary period, three consecutive months of full-time employment. G.L. c. 149, §105D.

Another key distinction is that parental leave is limited to eight weeks, in contrast to the FMLA's twelve-week allotment. However, if the leave is taken to care for a newborn or newly-adopted child, it generally would qualify for both FMLA and parental leave, and the employer may designate the leave as FMLA and parental leave concurrently. Importantly, the new parental leave law adopts the FMLA's limitation on the total amount of leave available where both parents work for the same employer. Like the FMLA, state law now provides that where both

parents work for the same employer, parental leave is limited to 8 weeks in aggregate (and not 16 weeks) for the birth or adoption of the same child.

As with worker's compensation or IOD leave, employers should carefully consider whether an employee's parental leave under state law should also be designated, concurrently, as leave under the FMLA.

11. Can I terminate an employee that is out on FMLA leave if I discover misconduct or incompetent performance while the employee is on leave?

While the answer to this question is "yes," it is imperative that a public employer be extremely cautious in taking employment action during or immediately after an employee's FLMA leave. First, employees on FMLA leave have a legal entitlement to be reinstated to the position they held when they went on leave, or an equivalent job (if, for instance, the original position has been eliminated for budgetary or organizational reasons). Second, employees on FMLA leave are legally protected from retaliation for exercising their rights under the FMLA. Thus, significant risk exists when terminating an employee while on FMLA leave, or even soon after return from FMLA leave, regardless of the reason.

However, the FMLA does not protect employees from their employers' reasonable job performance expectations. In each case, therefore, the specifically relevant facts will be essential in making a supportable decision to take employment action with respect to an employee on, or just returning from, FLMA leave. For example, terminating an employee with either a documented or undocumented history of performance problems only after the employee has requested or taken FMLA leave will very likely be viewed as retaliatory. However, a different outcome may be reached if a new triggering event occurs during the employee's FMLA absence, such as the discovery of a major issue such as fraud or embezzlement, or other significant instance of job incompetence. Such major issues are not wholly uncommon, as other employees are often required to perform some or all of the job duties of the absent employee, and discrepancies are then discovered.

In summary, employers take significant risk when taking disciplinary action against an employee who is on or has recently returned from an FMLA leave. In the absence of criminal activity by the employee, or other serious neglect of duty, it is likely that consultation with counsel will result in a recommendation to take a conservative approach.

12. Are there any other factors an employer should be mindful of when administering the FMLA with respect to union employees?

In most circumstances, prior to adopting, amending or implementing an FMLA policy, employers are required to provide notice of such action to unions and an opportunity to bargain to resolution or impasse over any *impact* of the action.

In fact, it is not uncommon to see FMLA "policy" language in a collective bargaining agreement. While parties may often feel that it is of little impact to include language in a collective bargaining agreement reiterating the employer's obligations under the FMLA, such action may subject an employer's FMLA determinations to the contract's grievance provisions, which would otherwise be inapplicable. For that reason, any proposal to include FMLA language in a union contract and the potential ramifications of proposing or agreeing to same, should be carefully considered during collective bargaining.