Mitchell & Sheahan, P.C.

August 2010 Newsletter

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Welcome to the August 2010 edition of the Mitchell & Sheahan newsletter!

Our August newsletter features an article written by Attorney Peg Sheahan. The article is titled *Ten FMLA Myths Your Employers Probably Believe*, which outlines some common FMLA misconceptions.

Bob Mitchell's vacation kept him from contributing to the Newsletter this month. He'll be back in future issues.

TEN FMLA MYTHS YOUR EMPLOYEES PROBABLY BELIEVE

MARGARET M. SHEAHAN

MYTH # 1- EVERY AMERICAN WORKER HAS FMLA RIGHTS.

Not so! The federal FMLA (Family & Medical Leave Act) only covers organizations with at least 50 employees (that have sufficient ties to interstate commerce, which nearly every business does). Connecticut's FMLA applies only to employers with 75 or more employees and not to government employers or to educational institutions below the college level.

Beyond the employer qualifications, both federal and Connecticut FMLA[1] have requirements individual employees must meet to be eligible for leave. A worker must have worked for the employer for at least 12 months (cumulatively, not consecutively), actually worked (not just been paid) for the employer a minimum number of hours (1,250 for the federal; 1,000 for the State) in the 12 months before the leave begins and (for the federal) work in a location that is within 75 miles of work locations of at least 50 of the employer's employees.

Under the federal statute, there are also limits on the post-leave reinstatement rights of a few highly compensated employees and timing restrictions on leaves taken by teachers near the beginning and end of term.

MYTH # 2- FMLA LEAVE IS PAID LEAVE.

Nope! Both federal and Connecticut FMLA are really job security provisions, not paid leave mandates. The statutes require the employer to permit employees to be absent for specified reasons within specified time limitations without losing their jobs. The statutes do not require employers to pay for the time employees take off. That said, both FMLA statutes permit employers to require, and employees to elect, use of paid time for FMLA, if the leave circumstances fit the employer's policy and practices for taking the paid time in non-FMLA situations. The Connecticut law requires employers that offer paid sick leave to permit employees to use up to two weeks of accumulated sick leave for FMLA purposes.

MYTH # 3- FMLA LEAVE IS ADDITIONAL TO EMPLOYER TIME OFF POLICIES.

Untrue! Often, an employee expecting a child proposes to use her sick time or short term disability, followed by her vacation, followed by her FMLA leave. While an employer is free to structure its FMLA policy this way, the statutes do not require it and few employers do. As discussed under MYTH # 2, commonly, sick and vacation time use runs concurrently with FMLA use.

MYTH # 4- FMLA LEAVE IS UNLIMITED.

Wrong! Federal law provides 12 work weeks in 12 months; Connecticut, 16 work weeks in 24 months. The employer's policy must elect one of several ways to measure the 12 and/or 24 month periods to apply to all employees, or else each leave taker is entitled to calculation according to the measure most favorable to him or her.

Federal and Connecticut FMLA allow a special kind of FMLA leave of up to 26 weeks in a 12 month period

starting the first day of leave in the event of certain family members' military-service-related injury or illness. FMLA leave occurring in that 12 month period for other qualifying reasons can count towards that 26 week limit as well.

MYTH # 5- FMLA LEAVE COVERS DEATH IN THE FAMILY.

Not the case! FMLA covers very specific family responsibility-related absences. Making funeral arrangements and mourning are not among them. Here's what is:

a. Birth, adoption or foster placement of a child,
b. Serious health condition of a parent, spouse or child requiring the employee's care,
c. Serious health condition of the employee causing disability to perform job functions,
d. Certain kinds of military deployment of a parent, spouse or child,
e. Certain family members' service-related injury or illness,
f. To be an organ or bone marrow donor.

The first five are qualifying reasons under federal law; the first three and the last two, under Connecticut law.

An employee who provides medical certification that his/her care is required for a parent, spouse or child's serious health condition or a qualifying service-related medical circumstance can take FMLA leave for the necessary absence. Should the family member/patient die, however, subsequent absence does not qualify as FMLA leave.

MYTH # 6- FMLA LEAVE COVERS PARENTS' SCHOOL ACTIVITIES.

Inaccurate! However, when FMLA leave is occasioned by a relative's military deployment, one of the reasons leave may be taken is to make school arrangements for affected school age children.

MYTH # 7- FMLA LEAVE IS ONLY FOR LONG TERM ABSENCE.

False! Under both federal and Connecticut FMLA, leave for the birth, adoption or foster placement of a child can be taken intermittently or on a reduced schedule basis, but only if the employer agrees. Serious health condition leaves must be permitted to occur on such a basis if the employee's health care provider certifies the need for it. Therefore, a doctor could prescribe half-time work or partial weeks for an employee and the FMLA entitlement could be utilized in increments of partial workweeks or

even partial days (in units as small as the employer's work time measurement system permits). Employers should have procedures in place to identify all absences that qualify for FMLA leave to permit accurate recordkeeping and communication with employees. An employer's failure to alert an employee that an absence "counts" as FMLA can require allowing more than the statutory maximum of absence in some circumstances.

MYTH # 8- FMLA LEAVE DOES NOT COVER WORKERS' COMPENSATION ABSENCES.

Not right! FMLA's recognition of the employee's own serious health condition as a proper reason for leave is not conditioned on the cause of the health condition or on the availability of compensation for the absence. If the Workers' Compensation illness or injury qualifies as a serious health condition, the time off can be counted against the employee's FMLA entitlement.

MYTH # 9- THE "FAMILY" IN FMLA INCLUDES ALL RELATIVES AND COHABITANTS.

Incorrect! Siblings, grandparents, aunts and uncles, nieces and nephews, live-in boyfriends and girlfriends can be very important people in our lives. Generally, however, their serious health conditions do not entitle us to FMLA leaves. There are some exceptions to this rule.

Both federal and Connecticut FMLA recognize "parent" to include a person who acted as a parent to the employee when the employee was a child, even if the employee was not the person's biological, adoptive or foster child. Connecticut FMLA also includes "parents-in-law" in the definition of "parent."

A spouse is someone to whom the employee is married. Common law does not count. Under federal FMLA, because of the "Defense Of Marriage Act," same-sex spouses or civil union partners do not count. Under Connecticut FMLA, however, these spouses' serious health conditions can occasion FMLA use.

Federal FMLA's leave to care for a family member suffering a military-service-related injury or illness is available to the service member's spouse, parent, child and "next of kin." This last category can be determined in a number of ways, including designation by the service member, and can include more than one person.

MYTH # 10- ALL BENEFITS CONTINUE THROUGHOUT FMLA LEAVE.

Not accurate! Under federal and Connecticut FMLA, an employee using paid time off benefits must be treated the same as an employee using them for non-FMLA absence,

which usually includes continuation of all benefits and employer contributions.

Under federal FMLA, the employer must continue to provide medical coverage to an employee throughout FMLA leave on the same basis as it is offered to active employees, whether or not the leave is covered by paid time off. Therefore, if employees contribute a portion of the premium for such coverage regularly, the unpaid leave taker must do this, too. This usually requires the employee to write a check for an amount that normally would be deducted from pay. An employee can decline to make the payments but then can lose coverage for the period the payment would have supported.

Connecticut FMLA does not require the employer to continue medical coverage during unpaid leave on the same basis as for active employees. This can make the employee eligible for COBRA continuation coverage at his/her own expense.

In any case, when leave is over and the employee returns to active work, coverage must be reinstated on regular terms without delay. FMLA leave must not disadvantage the employee. Therefore, periods of FMLA leave must "count" towards employee benefits that require nothing more than attendance. For example, leave counts towards retirement plan service credit, perfect attendance rewards and other solely length-of-service-based compensation and benefit enhancements.

CONCLUSION

Employers should develop, update and disseminate clear and accurate FMLA policies and communication tools and provide training to supervisory employees about implementation. Compliance is not automatic - or, sometimes, even logical!

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[1] Employers covered under both federal and Connecticut FMLA must comply with both and do what is most advantageous to the employee in any case of conflict between the two laws. When the requirements of both statutes are met, absence "spends down" the employee's leave entitlement under both statutes simultaneously. Some absences, however, qualify as FMLA under one of the statutes but not the other and so affect an employee's entitlement under only one. For example, leave to care for a parent-in-law IS Connecticut FMLA, but IS NOT federal FMLA.

We hope you find these articles helpful and informative. As always, please contact us with any questions or concerns.

Sincerely,

Mitchell & Sheahan, P.C.

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