The Employment Brief

Updates in Labor and Employment Law to Help Your Business Succeed

CONTENTS

PG. 2
ARBITRATION FOLLIES
A Contract is a Contract

PG. 2
D.C.
D.C. Passes Mandatory Paid Sick Leave Law

PG. 2
IMMIGRATION
No-Match is Back

PG. 3
KOLLMAN'S CORNER
At-Will Employment

PG. 3
IMMIGRATION
H-1Bs

FMLA

A Brief Review of the DOL's Proposed Changes in FMLA Regulations

by Darrell R. VanDeusen

In February 2008, the Department of Labor (DOL) finally published proposed changes to the 1995 Regulations under the Family and Medical Leave Act (FMLA). The proposed changes are found in the February 11, 2008 Federal Register. 73 Fed. Reg. 28, 7875-8001. The proposed changes bring with them some indication that the DOL has listened to the federal courts that have criticized the 1995 rules.

Over five years ago the Supreme Court struck down an FMLA regulation in *Ragsdale v. Wolverine Worldwide, Inc.*, joining many lower courts that had rejected some of the 1995 regulations as an over-broad interpretation of the Act. The *Ragsdale* Court held Section 825.700(a) of the DOL Regulations to be "incompatible with the FMLA's comprehensive remedial scheme." The DOL immediately promised revisions to the regulations, but did not do so. Four years later, in December 2006, the DOL finally solicited public comments on the FMLA and its Regulations.

Certain parts of the new regulations show an effort by the DOL to correct some of those areas where the courts have expressed concerns with the existing regulations inconsistencies, vagaries, and general problems interpreting the Act. Some new rules clarify what already seemed to be clear. And some changes, or lack thereof, suggest that there will still be litigation for years to come when interpreting the Act.

DOL has asked for comments on the proposed regulations by April 11, 2008. It is expected that the DOL will review the comments it receives and provide final regulations by the end of the year. Of course, the November elections could have a significant impact on the proposed changes and on future changes to the FMLA.

Here is a summary of some of the key changes in the regulations as proposed by the DOL, followed by a section by section description of the changes:

For qualification purposes, employment periods that preceded a break in service for any reason must be counted in determining whether an employee had been employed by the employer for at least 12 months, when the break is less than 5 years. 29 C.F.R. § 825.110(b).

Employment periods preceding a break in service of more than 5 years must be counted if, among other things, "a written agreement, including a collective bargaining agreement, exists concerning the employer's intention to rehire the employee after the break." 29 C.F.R. § 825.110(b).

Employees may waive, release and settle past (but not prospective) FMLA claims "without the approval of the Department of Labor or a court." 29 C.F.R. § 825.220(d).

Employers may provide a job description or other statement of essential job functions to a health care provider for review as part of the medical certification or fitness-for-duty process. 29 C.F.R. § 825.310(c).

In order for a medical certification to be sufficient, it must specify "what functions of the employee's position the employee is unable to perform." 29 C.F.R. § 825.123(b).

In circumstances where a medical certification is vague, an employer may contact the employee's health care provider directly for clarification. Employers may also contact health care providers directly to authenticate a certification. 29 C.F.R. § 825.307(a). This is a significant change in the existing rules, which state that an employer may not contact the employee's health care provider directly.

Employees have "an obligation to respond to an employer's questions designed to determine whether an absence

is potentially non-FMLA qualifying." 29 C.F.R. § 825.302(c).

Calling in "sick," without providing more information, does not constitute sufficient employee notice under the Act. 29 C.F.R. § 825.303(b).

A medical certification "is considered incomplete if . . . one or more of the applicable entries have not been completed." 29 C.F.R. § 825.305(c).

"A medical certification that is not returned to an employer . . . constitutes a failure to provide certification." 29 C.F.R. § 825.305(c).

An employee's response to an employer's request for clarification of a vague, ambiguous or non-responsive medical certification must be provided within seven calendar days, unless it is not practicable despite the employee's "diligent good faith efforts." 29 C.F.R. § 825.305(c).

Employers are permitted to require employees on FMLA leave to "satisfy any procedural requirements and meet any additional qualifying standards" of paid leave policies in order to qualify for such payments. 29 C.F.R. § 825.207(a).

A public employer may require an employee's paid compensatory time be used concurrently when substituting accrued paid leave for unpaid FMLA leave. 29 C.F.R. § 825.207(f).

Bonuses "based on the achievement of a specified goal such as hours worked, products sold or perfect attendance" can be denied if the employee has not met the required goal when he is returned to an equivalent position with equivalent pay and benefits. 29 C.F.R. § 825.214(c)(2).

If an employee is on non-FMLA leave at the time he meets the eligibility requirements of the Act, the portion of the leave taken after qualifying for FMLA leave is counted as FMLA leave. 29 C.F.R. § 825.110(d). An employer's generosity in extending FMLA-type leave to an employee prior to eligibility will not count toward the employee's total 12-week FMLA entitlement.

The period required for employers to provide FMLA eligibility and designation notices to employees is extended from three to five business days. 29 C.F.R. § 825.300(b)(1).

The definition of a "serious health condition" is clarified to note that incapacity and continuing treatment by a health care provider must include 2 treatments within 30 days of the beginning of a period of incapacity "unless extenuating circumstances exist" or, alternatively, one treatment that results in a regimen of continuing supervised treatment. 29 C.F.R. § 825.115(a)(1).

"As soon as practicable" for purposes of providing notice of the need for unforeseen or other applicable FMLA leave means "as soon as both possible and practical . . . . For example, where an employee learns during the work day on Monday that a scheduled doctor's appointment has been rescheduled . . . it would ordinarily be practicable for the employee to provide notice . . . before the end of the work day" or the next business day "if the employee did not learn of the change . . . until after work hours." 29 C.F.R. § 825.302(b).

Arbitration Follies

A Contract is a Contract?

by Peter S. Saucier

The Borough of West View, Pennsylvania, decided that the senior bidder for a meter reader position was not the best choice. The job called for the employee to enter private homes once a year, and the senior bidder had been arrested two years earlier for being intoxicated, violently destroying property, carrying a handgun and threatening to "put a bullet in the head of the police officer" who arrested him. He also threatened his ex-wife and engaged in enough violent acts to have a peace order placed against him. That made the employer decide that he was not a good risk for entering private homes. His union dutifully grieved, and arbitrator Christopher Miles ordered that the employee be placed in the job. Sure the employer has cause for concern about public safety, Miles reasoned, but the contract said the most senior gets the job. A contract is a contract.

D.C.

D.C. Passes Mandatory Paid Sick Leave Law

by Eric Paltell

On March 4, 2008, the District of Columbia City Council passed the "Accrued Sick And Safe Leave Act of 2007." The bill, which will become law in April if Congress does not intervene, requires District employers with 51 or more employees to provide seven paid "sick or safe days" per year. Employers with less than 51 employees have to provide a lesser number of leave days, with employers of ten or fewer employees required to provide three paid sick or safe days annually.

The bill requires employers to allow its employees to use the leave for their own illness, preventive care, or to care for an ill family member or a domestic partner. Family members are defined to include children, parents, and spouses.

The Council did add several "business friendly" amendments to the legislation before it was passed. Employees will not be eligible for the leave until they have worked for the employer for at least a 12 month period. Wait staff in restaurants are exempted from the law, and any employer can apply for a "hardship exemption." The Mayor's Office will be preparing guidelines as to what qualifies as a "hardship."

The D.C. law may be a precursor of what is to come at the federal level. Presently pending in Congress is the Healthy Families Act, which would provide up to seven days of paid sick leave for full time employees who work more than 30 hours per week year round or 1500 hours per year. Part-time employees who work more than 20 hours per week would receive a pro rata share of such leave. Unlike the District of Columbia version, the federal law would not require that employees work for an employer for any period of time to be eligible for leave.

Immigration

No-Match is Back

by Ken C. Gauvey

In 2007 the Department of Homeland Security tried to establish a new set of employer obligations. These new obligations involved investigating and, in some cases, terminating employees when the social security number they provided did not match the records of the Social Security Administration's database. Employers were to become aware of this concern by the issuance of a "No-Match Letter" sent to employers by the SSA.

A flury of lawsuits ensued and the federal courts put these new regulations on hold for a variety of reasons. Late in 2007, DHS withdrew the regulations with a promise to revise them

in order to address the concerns of the court.

On March 21, 2008, DHS issued a supplemental proposed rule to address the three concerns of the Court. The reality is that DHS did not change the rules at all and simply issued comments that say that the new rules address the concerns of the Court. The repromulgated rules state that DHS disagrees with the Court and tries to explain away the concerns of the court rather than addressing them.

A new series of lawsuits are already in the works to stop these regulations from going into effect. Right now, the DHS regulations are in the comment period and employers are not required to comply with them, although there are both pros and cons for doing so.

For more information on the DHS No-Match regulations, safe-harbor procedures or the status of the regulation, please contact Ken C. Gauvey.

Kollman's Corner

At-Will Employment

by Frank L. Kollman

Yesterday, a client asked about firing an employee who was accused of stealing from a customer. The client stated that the person was an "at-will" employee, so the company did not feel that it had to give the employee a reason for the termination. This is not the first time a client or a seminar participant has tried to rely on "at-will" employment theories to do a sloppy job of discharging an employee.

The concept of "at-will" employment is a worthless legal principle, and employers should not invoke it to justify a termination. The minute an employee has a colorable claim that his termination was motivated by an illegal reason, he or she is no longer an at-will employee as far as a court is concerned. If an employer cannot articulate a non-discriminatory reason why it fired a person, the employer leaves itself open to charges of discrimination, abusive discharge, unlawful retaliation, and so on.

Forget at-will employment. No employer should ever fire an employee without articulating a reason and telling the employee the reason at the termination meeting. There are too many statutes and legal decisions granting so-called at-will employees extensive rights to take the position that "I did not need a reason to fire the employee because, after all, he was an at-will employee." That is an invitation to disaster.

In fact, I tell my clients to approach terminations with compassion, but a measure of pride. If you are convinced that termination is appropriate, tell the employee straight out why he or she is being let go, and make no apologies or excuses. Do not soften the blow. Do not say anything that could be interpreted later as a lack of confidence in the discharge decision. If you are sued later for discrimination, you will thank me for this advice because you will eliminate an avenue of attack by the former employee's lawyer. "You told Mr. Jones that you felt bad about the decision, didn't you? And you felt bad because you knew he was being fired because of his race, correct?" Don't give a lawyer a chance to make you look foolish.

For more thoughts and comments by Frank Kollman, visit his blog at http://kollmanlaw.com/blogs

Immigration

H-1Bs

by Ken C. Gauvey

Any employers who have hired H-1B workers or who are trying to hire H-1B workers know what time of year this is. April 1 is the day that new H-1B petitions are accepted by USCIS for a start date of October 1, 2008. By statute, the number of H-1B's allowed each year is capped at 65,000, minus some specific allowances for certain parts of the world. Each year, nearly three times that many are applied for.

The H-1B is a petition to employ temporary skilled workers. These skilled workers are workers with higher degrees or specific skills needed to perform a skilled job. A typical H-1B works in the U.S. for six years before having to leave.

In a recent study, the National Foundation for American Policy found that there were 140,000 job openings available for such skilled workers in S&P 500 companies alone. A second study found that H-1B's resulted in job creation in the U.S. The study showed that for every H-1B position requested, U.S. technology companies increased employment by five workers. This number goes up when you consider companies who currently employ fewer than 5,000 workers. In a statement by Bill Gates, Mr. Gates said that "Microsoft has found that for every H-1B hire we make, we add on average four additional employees to support them in various capacities."

Not only does bringing in skilled labor increase the U.S. workforce, but it also prevents outsourcing. Microsoft recently moved part of its facility to Canada in order to be able to hire the skilled workers it needs.

To address this shortcoming, a bill has been introduced in Congress to increase the number of H-1B's from 65,000 per year to 130,000. Other bills have also been introduced to expand this limit even more. It is unlikely that any bill will have any immedate effect, as the deadline for filing H-1B petitions is the week of March 31.

Kollman & Saucier, P.A.
The Business Law Building
1823 York Road
Timonium, MD 21093
P. 410.727.4300
F. 410.727.4391

To be added to our mailing list or if you have comments or questions, please email us at kgauvey@kollmanlaw.com.