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THE EMPLOYER'S QUARTERLY

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FMLA CHANGES: FEDERAL AND STATE

*by
Anne-Marie L. Storey*

There are a number of significant changes to the federal and state FMLA laws.

Federal Changes

On January 28, 2008, the National Defense Authorization Act was enacted. Among other things, this law amends the federal FMLA to create two new leave entitlements: "military caregiver leave" and "active duty leave".

Military caregiver leave is a new qualifying reason for which an eligible employee can take federal FMLA leave. This provision allows an eligible employee who is the spouse, son, daughter, parent or next of kin of a covered servicemember to take 26 workweeks of unpaid leave during a single 12-month period to care for the servicemember; this is more than twice the leave entitlement available under other provisions of the Act. A "covered servicemember" is defined as a member of the Armed Forces "who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list for a serious injury or illness." "Serious injury or illness" is defined as an injury or illness incurred by the

member in the line of active duty "that may render the member medically unfit to perform the duties of the member's office, grade, rank, or rating".

This new leave entitlement raises a significant number of unanswered questions. For instance, what does it mean for a covered servicemember to be undergoing medical treatment -- does the treatment have to be provided by the Armed Forces or can it be by a private provider? What if the serious injury or illness does not manifest itself until the servicemember has left military service? If that happens, how is an employer to determine that the illness would have rendered the individual unfit to perform the duties of his or her office, and who makes that determination? Is a "serious injury or illness" the same as a "serious health condition", which is the standard for granting leave under other provisions of the Act? What kind of medical

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certification is permitted? The new law allows an employer to request a medical certification for the need for leave, but does not tell us what information the certification can contain and whether it can be issued by a non-military health care provider. Who falls within the "next of kin" designation? Is that someone designed by the employee? What happens if the person defined as next of kin does not want to provide the care – can someone other than the next of kin do so? And, perhaps most importantly, what is a single 12-month period? Does that mean the employee is only entitled to one such leave during the entire course of their employment or is it 26 weeks in every 12 month period? And finally, when does the 12 month period begin- is it on the date of the servicemember's injury or illness, the date they return home, or some other date? Can the employer designate the way in which the 12 month period runs, as they can with other FMLA leave?

The DOL is currently working on regulations that should provide clarification of these and other questions. The comment period extended through April 11, 2008. There is no projection from the DOL as to when the new regulations will actually be issued. Until they are, however, the DOL has said that it will "require employers to act in good faith" in providing this leave and directs employers to apply their existing "FMLA-type procedures" to requests under this section.

The second new type of leave is "active duty leave". This provision allows an employee to take up to 12 weeks of leave in a 12 month period because of a "qualifying exigency" arising out of the fact that the spouse, son, daughter, or parent of the eligible employee is on active duty or has been called to active duty. The law does not define "qualifying exigency." The DOL is charged with that responsibility. The preliminary comments suggest this leave is not meant for medical situations, which would likely be covered under other FMLA provisions. It also suggests not everything will be covered as a "qualifying exigency" simply by use of the term "qualifying". The DOL has given some examples of possible qualifying exigencies: making arrangements for child care, making

financial and legal arrangements to address the servicemember's absence, attending counseling related to the active duty of the servicemember, or attending to farewell or arrival arrangements for a servicemember. One significant unanswered question under this provision is how such time off is certified – the new law allows for certification but defers to the DOL as to what information it has to include and who issues it (i.e. is an affidavit from the employee sufficient?).

According to the DOL, employers are not required to provide this new active duty leave until the DOL defines "qualifying exigency" in its final regulations. But, at the same time, it "encourages" employers to immediately provide the leave entitlement.

Neither of these provisions changes the fact that an employer and employee must still meet the eligibility requirements for leave under the federal FMLA. So, if an employer does not have a sufficient number of employees to be covered by federal FMLA, these provisions will not apply to them. Likewise, if an employee has not worked the required 1250 hours or been employed for the required time period, they will not be eligible for this leave. In addition, those employers who are covered by this law must be careful about how these provisions interact with state law. Leave under one of the new sections may run concurrently with a provision of Maine FMLA but also may not, depending on the circumstances. If the leave does not run concurrently, an employer may have to provide additional leave.

Until the final regulations are issued, we are left with more questions than answers. In the meantime, however, the provisions are in effect and employers should make every effort to apply these provisions in good faith. FMLA policies and handbook provisions will need to be amended to describe these additional leave rights. The DOL has also issued a preliminary poster that can be posted immediately to help demonstrate a good faith effort to comply. The poster can be found at <http://www.dol.gov/esa/whd/fmla/NDAAAmndmnts.pdf>

State Changes

The most recent change to the State FMLA is the amendment recently signed by the Governor that allows an eligible employee to take leave time for a sibling with a serious health condition or a sibling who dies or incurs a serious health condition while on active military duty. Sibling is defined as "a sibling of the employee who is jointly responsible with the employee for each other's common welfare as evidenced by joint living arrangements and joint financial arrangements." Based on this definition, certainly not all siblings will be included - this definition is more like that of a domestic partner (which, incidentally, excludes siblings). The amendment will take effect 90 days after the adjournment of the Second Regular Session. At that point, employers subject to the Maine FMLA should amend their policies to include this new category.

On May 13, **Anne-Marie Storey** will present a seminar for the Bangor Region Chamber of Commerce Workplace Seminar Series on the topic of hiring. For more information, please contact the Chamber.

Michael P. Friedman will be speaking to the New England College of Occupational and Environmental Medicine on May 15 on medical causation in litigation settings.

On May 21, **Anne-Marie Storey** will participate as a speaker at the Governor's Regional Conference on Small Business and Entrepreneurship on the topic of the Top 10 Mistakes Made by Small Businesses in Employment.

Did You Know?

Frank McGuire will be a presenter at the Maine Human Rights Compliance Seminar, sponsored by the Maine Human Rights Commission, on April 16, 2008, at the Holiday Inn By The Bay in Portland.

Anne-Marie Storey will be a presenter at the Maine HR Convention at the Samoset on May 6. Her topic is "E-Danger! Computer Issues at Work".

Paul H. Sighinolfi will be a presenter at the Maine HR Convention at the Samoset on May 8. His topics are "What Is An Employer's Premises In the Workers' Compensation Context", and "Evolution of Permanent Impairment In the Context of a Workers' Compensation Claim: Where We Were, Where We Are, and Where We Are Going."

SUPREME COURT HOLDS DOOR OPEN TO "ME, TOO" EVIDENCE

by
Frank T. McGuire

Plaintiffs suing for employment discrimination sometimes try to bolster their cases by proving the employer has treated other employees adversely based on the same protected class as the plaintiff. Even when the decision-makers involved are different, the argument is that the employer has a culture or history of tolerating discriminatory conduct. Employers counter that such evidence is not relevant to the particular decision being challenged (under Evidence Rules 401 and 402), and that even if relevant, the probative value of such evidence is substantially outweighed by the danger of unfair prejudice (Rule 403).

In *Sprint/United Management Co. v. Mendelsohn*, decided on 2/26/2008, the Supreme Court held that such "me, too" evidence is not *per se* admissible or inadmissible. The Court stated that the question whether evidence of discrimination by other supervisors is relevant in any individual case is fact based and depends on

many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case. Applying the "unfairly prejudicial" standard of Rule 403 likewise requires a fact-intensive, context-specific inquiry. Because the trial judge's ruling excluding such evidence from Ms. Mendelsohn's age discrimination trial did not make it clear whether the judge had applied a *per se* rule, the Court sent the case back for clarification.

This means that in the discovery phase of a discrimination case it will be more difficult for an employer to resist producing information about complaints by other employees. It also means that a motion before trial to exclude such evidence (called a motion *in limine*) must be based on how well or poorly the evidence of the treatment (or claimed treatment) of other employees fits the facts of the present case.

NEW WORLD FOR PENSION PLAN LITIGATION

by
Brent A. Singer

The United States Supreme Court issued a decision February 20, 2008, *LaRue v. DeWolff, Boberg & Associates, Inc.*, that promises to have a dramatic impact on future claims against employers for mismanagement of their pension plans. A bit of background is useful to put the decision into perspective.

ERISA is the federal law that governs most employer sponsored employee benefit plans, including pension and retirement plans. "Preemption" is a legal term that refers to the fact that when federal law governs, federal law takes precedence over, i.e., "preempts," conflicting state law. If the state law conflicts with the federal law, the federal law prevails.

Courts have interpreted ERISA preemption very broadly. For example, Section 502(a) of ERISA

contains many subparts. Each subpart specifies that this or that individual may sue for this or that form of relief. Thus, for example, Section 502(a)(1) specifies that a plan participant may sue "to recover benefits due to him under the terms of the plan."

Nothing in Section 502 states that Section 502 provides the only remedies for plan participants. However, the United States Supreme Court has held that ERISA preemption is so strong that even without saying so, Section 502(a) is in fact the only source of relief for plan participants. The importance of this cannot be overstated.

For example, under Maine law, compensatory damages for mental anguish and loss of enjoyment of life are regularly available. Under Maine law, "punitive damages" are also available if a defendant acts maliciously. The amount of compensatory and punitive damages awarded can be very high and unpredictable. Section 502, however, does not provide for compensatory or punitive damages. This means that however badly an employer fouls up in the management of an ERISA plan, the employer will not be liable for compensatory or punitive damages.

Thankfully, the Court's decision in *LaRue* has not changed this basic principle.

However, the Court's decision in *LaRue* has interpreted much more broadly an important subpart of Section 502(a). Specifically, Section 501(a)(2) provides that a plan participant may sue "for appropriate relief under Section 409." Section 409 provides that a plan fiduciary who breaches a duty is "personally liable to make good to such plan any losses to the plan resulting from each such breach."

Until now, lower courts thought this meant that if an individual participant lost money because his employer was careless, the participant had no claim under Section 501(a)(2) because Section 409 pertained only to losses suffered by a plan as a whole. In the context of a 401(k) plan, the Court in *LaRue* disagreed and held that an individual participant can recover under Section

501(a)(2) for losses to his own individual account.

Consequently, it now seems that an individual employee can recover from his employer for losses to his account caused, for example, by carelessness in the selection of a mutual fund investment option with unreasonable or hidden fees, or that underperforms, or for inadequate disclosures or educational presentations about plan investment alternatives. Although it may be some time before we begin to see such suits, and although large employers with large plans may be the first to feel the impact, it is probably only a matter of time before such claims are made with some regularity.

JOIN US FOR A LUNCH AND LEARN

April 18, 2008

**“The Legal Fundamentals of
Wellness Programs- What
Types of Employer Sponsored
Health Promotion or Disease
Prevention Programs are Legal
and What Types are Not”**

**Bangor Public Library, 3rd floor
Noon – 1:00 p.m.**

Complimentary lunch provided.

**RSVP to Patricia Lawrence at
plawrence@rudman-winchell.com**

PROTECTIVE AND PERSONAL PROTECTIVE EQUIPMENT

by

Michael M. McAleer

The date by which employers must fully implement the payment requirements for protective and personal protective equipment mandated by OSHA is rapidly approaching. That date is May 15, 2008.

In a revision to its General Industry Standard that became effective on February 13, 2008, OSHA clarified its mandate requiring employers to provide and pay for protective equipment, including personal protective equipment for its employees. Subpart I of the Occupational Safety and Health Standards (29 CFR 1910.132) sets forth the general requirements an employer must meet with respect to the provision of protective equipment and personal protective equipment, for its employees.

The Title of Subpart I, which is “personal protective equipment”, is somewhat misleading, as the mandates apply not only to personal protective equipment (PPE) but also to “protective equipment”. The Standard itself makes no further distinction between PPE and protective equipment. Recently, however, OSHA has issued citations under 1910.132 for an employer’s failure to provide employees with personal fall protection systems.

OSHA’s mandate to employers requiring payment for protective equipment is set forth in paragraph (h) § 1910.132. The requirements of this paragraph, however, are general and apply to all general industry employers. The mandates of subparagraph (h) are superseded when the provisions of another OSHA Standard specify whether or not the employer must pay for specific protective equipment. In other words, where there is another OSHA Standard applicable, the payment provisions of that Standard prevail over those of paragraph (h).

The payment obligations of paragraph (h) which, again, must be fully implemented by May 15, 2008, have only a few exceptions. The exceptions are as follows:

The employer is not required to pay for non-specialty safety-toe protective footwear (including steel-toe shoes or steel-toe boots) and non-specialty prescription safety eyewear, provided that the employer permits such items to be worn off the job site.

When the employer provides metatarsal guards and allows the employee, at his or her request, to use shoes or boots with built-in metatarsal protection, the employer is not required to reimburse the employee for the shoes or boots.

The employer is not required to pay for logging boots required by 29 CFR 1910.266 (d) (1) (v).

The employer is not required to pay for everyday clothing, such as long-sleeve shirts, long pants, street shoes, and normal work boots.

The employer is not required to pay for ordinary clothing, skin creams, or other items, used solely for protection from weather, such as winter coats, jackets, gloves, parkas, rubber boots, hats, raincoats, ordinary sunglasses and sunscreen. However, if the requirements of an employee's job require exposure which goes beyond that which a typical employee might experience, care should be taken to assess whether or not payment should be made.

The employer must pay for replacement PPE, except in those circumstances where the employee has lost or intentionally damaged the PPE to be replaced.

An employee may provide his or her own protective equipment. Even in the case of employee provided protective equipment, however, it is the employer that is responsible to assure the adequacy, proper maintenance, and sanitation of such equipment.

Where an employee provides adequate protective equipment he or she owns, the employer may allow the employee to use it and is not required to reimburse the employee for that equipment. However, the employer may not require an employee to provide or pay for his or her own PPE, unless the PPE falls into one of specific exceptions set forth in paragraphs (h)(2) through (h)(5) of Section 1910.132, which exceptions are outlined above.

Subpart I also includes additional mandates which an employer must meet with respect to protective equipment and personal protective equipment. These mandates include hazard assessment and equipment selection, training and written certifications with respect thereto.

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