What You Don't Know Can Hurt You

Know your labor regulations before you act

By Sidney Lewis, Mark Adams and Tom Hubert

The regulations issued by the Department of Labor (DOL) under the Family and Medical Leave Act (FMLA) are long and complicated, and litigation is on the rise regarding alleged violations of these detailed procedures.

It is critical that employers understand and follow their obligations under the FMLA.

A recent United States Fifth Circuit Court of Appeals decision involved an employee's claim that her discharge for excessive absences violated the FMLA. The employee argued she was not given the full 15 days to complete the Certification of Health Care Provider form before being fired. The parties disputed the date on which the 15-day period began to run. The employer had notified the employee in writing several days after her FMLA request that medical documentation was needed to support her absence, but did not send the certification form until 10 days later. The employee claimed the 15-day period began from the date she actually received the certification form, while the employer argued it began on the day she requested FMLA leave.

The court found that it was neither, holding instead that it was the date the employer informed the employee in writing that supporting documentation was needed. The court noted that the FMLA does not require an employer to request medical documentation on a particular form. All that's required is for the employee to be informed in writing that he has 15 days in which to submit proof of a serious health condition. The employee also must be informed of the consequences if the form is not submitted by the deadline date.

It is critical that employers understand and follow their obligations under the FMLA. The following FMLA checklist should help:

- Employee handbooks or other materials describing leave rights must contain an FMLA policy.
- An FMLA poster must be posted in the workplace.
- The 12-month period used for determining how much FMLA leave an employee has should be expressed in the written policy. (Is your 12-month FMLA period a calendar year, a fiscal year, or a rolling 12-month period? You have a choice.).
- Employees do not have to request FMLA leave by name. They need only give you the reasons why they need leave; it is up to you to determine whether the leave is FMLA-qualifying.
- For every FMLA-qualifying leave, the Employer Response form published by the DOL should be filled out and a copy given to your employee.
- Use of the Certification of Healthcare Provider form, also published by the DOL, should be used to verify the serious health condition claimed by your employee if you have any doubt or question as to whether the employee's leave is FMLA-qualifying.
- If the Certification of Healthcare Provider form is not used, you still can designate the leave as FMLA-qualifying based on verbal or written information provided by your employee.
- When in doubt, you can preliminarily designate an employee's leave as FMLA-qualifying and then request in writing that medical documentation is provided to support the leave.
- Employees are not eligible unless they have been on your payroll for 12 months and have actually worked 1250 hours in the 12 months prior to commencement of their leave.
- FMLA-eligible employees on workers' compensation leave should be notified if their leave is FMLA-qualifying and given FMLA papers.
- You should check your state's leave laws, especially pregnancy and maternity leave statutes, regarding any additional protections afforded your employees.
- You should train all supervisors regarding the FMLA and their responsibilities to ensure compliance.
- A supervisor who ignores a request from an employee for FMLA leave may be held individually liable along with the company.

Watch out for plan loans to owner-employees

Many employers with 401(k) and other qualified retirement plans may not realize that loans from such plans to employees are allowed only as a result of exemptions in the Internal Revenue Code and ERISA. Without these exemptions, the loans would be prohibited transactions. The exemptions do not protect all employees. Five percent owners of "S Corporations," 10% owners of partnerships and sole proprietors are ineligible for the prohibited transaction exemption; thus any plan loan to one of them could trigger prohibited transaction penalties.

What happens if an employee takes out a loan and later becomes an owner-employee? For example, an employee might be admitted into a partnership with a greater than 10% ownership stake at a time when he has a 401(k) loan. The DOL issued an information letter last fall, which stated that such a loan, as a continuing transaction, would become a prohibited transaction if the employee became an owner-employee. The problem can also arise when a "C Corporation" elects to become an "S Corporation."

Administrators of plans of closely held entities should be consulted when a participant in a qualified plan obtains an ownership share of the entity or when there is an election to become an "S Corporation." If the participant in question has a loan, he should pay back the loan before becoming an owner-employee or risk the assessment of prohibited transaction excise taxes and penalties.

Social security earnings limit repealed

Employers can expect a few more senior citizens in the job market following the passage of a law that repeals the limit on the amount of money seniors can make without losing a portion of their Social Security benefits. Prior to the repeal, Social Security recipients age 65-69 lost $1 of benefits for every $3 they earned above $17,000. The limit did not apply to those over age 69. Workers whose benefits were reduced received additional credit once they reached age 70. TR

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