Your Monthly Legal Update – December 2008

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FMLA CHANGES

I thought it would be timely to provide information as to the FMLA changes that are coming up effective January 1, 2009 and which are receiving so much marketing for the new year. My reference for this information is the Department of Labor. I am providing the highlights that I thought were the most relevant to our group.

1. **Military Caregiver Leave (also known as Covered Service member Leave):** Eligible employees who are family members of covered service members will be able to take up to 26 workweeks of leave in a "single 12-month period" to care for a covered service member with a serious illness or injury incurred in the line of duty on active duty. This 26 workweek entitlement is a special provision that extends FMLA job protected leave beyond the normal 12 weeks of FMLA leave. This provision also extends FMLA protection to additional family members (i.e. next of kin) beyond those who may take FMLA for other qualifying reasons.

2. **Qualifying Exigency Leave:** This category of leave helps families of members of the National Guard and Reserves manage their affairs while the member is on active duty in support of a contingency operation. This provision makes the normal 12 weeks of FMLA protected leave available to eligible employees with a covered military member serving in the National Guard or Reserves to use for "any qualifying exigency" arising out of the fact that a covered military member is on active duty or called to active duty status in support of a contingency operation. The Department's final rule defines "qualifying exigency" as follows:

    i. Short notice deployment;
    ii. Military events and related activities;
    iii. Childcare and school activities;
    iv. Financial and legal arrangements;
    v. Counseling;
    vi. Rest and recuperation;
    vii. Post-deployment activities; and
    viii. Additional activities not encompassed within the above categories but agreed to by the employer and employee.

    It should also be noted that the final rule also includes two new DOL certification forms that employers can use to facilitate certification requirements for the use of military leave.

    Other Points of Interest in the new Regulations:

    You should also take note that time spent by an employee performing "light duty" work does not count against an employee's FMLA leave and the leave is held in abeyance.

This is a point of clarification as most employers were probably applying this accordingly. If an employee is voluntarily performing light duty, the employee is no longer on FMLA leave.

The final rule still retains six individual definitions of "serious health condition" but adds some guidance. In the scenario where the individual qualifies under the three consecutive, full calendar days of incapacity plus two visits to a healthcare provider – the visits to the provider must occur within 30 days of the beginning of the period of incapacity and the first provider visit must take place within seven days of the first day of incapacity. The second way to qualify for serious health condition FMLA benefits, more than three consecutive, full calendar days of incapacity plus a regimen of continuing treatment – the first visit to the healthcare provider must take place within 7 days of the first day of incapacity. The final rule defines "period visits" for a chronic serious health condition as at least two visits to a healthcare provider per year, which keeps this very open-ended as far as an ongoing regimen of continuing health care.

Finally, perfect attendance awards can be provided by employers so long as they treat employees taking non-FMLA leave in an identical way.

I direct everyone to the Department of Labor website for a thorough review of the new regulations.

I sincerely wish everyone a wonderful holiday season!