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Blog Post

Family and Medical Leave: What's New and What's Not

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Last month, President Biden rolled out "the American Families Plan," a proposal that would phase in *paid family and medical leave* for employees with certain medical and family obligations. The proposal would cost around $225 billion over 10 years, which, according to the White House, would be paid mostly by upping taxes on the wealthy. According to a White House fact sheet, President Biden's proposed plan would guarantee workers 12 weeks of paid leave, which they could use to bond with a new child, care for a seriously ill loved one, deal with a loved one's military deployment, find safety from sexual assault, stalking, or domestic violence, heal from their own serious illness, or take time to deal with the death of a loved one. The program would provide workers up to $4,000 a month, with a minimum of two-thirds of average weekly wages replaced, rising to 80 percent for the lowest wage workers. The program would phase in paid family and medical leave over a 10-year period, guaranteeing 12 weeks of paid parental, family, and personal illness/safety leave by the 10th year.

Current Federal Family and Medical Leave

The Family and Medical Leave Act (FMLA), enacted in 1993, provides covered employees the right to take an **unpaid** leave of absence for medical or certain family obligations without jeopardizing their

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continued employment. Generally, FMLA leave extends up to 12 weeks during an employer-specified 12-month period, but can be up to 26 weeks to care for a military family member. Employees' jobs are protected during leave and employees are generally entitled to return to work after the leave. FMLA leave applies if an employee works at a worksite where at least 50 employees are employed within 75 miles, was employed for 12 months (which need not be consecutive), and worked 1,250 hours in the 12 months preceding the start of the leave.

Last year, the FMLA was amended to provide up to 12 weeks of **paid** parental leave, but only to covered *federal employees* in connection with the birth or placement of a child occurring after October 1, 2020. No such paid leave is mandated for private sector employees who are new parents.

There are but a few nations around the world that do not mandate paid leave for new parents: Lesotho, Liberia, Papua New Guinea, Swaziland, and the United States. While some states have stepped up, as of last December, only a handful had enacted some form of paid parental leave.

Whether the American Families Plan will ever become law remains to be seen. In the meantime, the existing FMLA provides some protections for employees — and many traps for employers. Below are some of the more common pitfalls.

Failing to Recognize and Timely Respond to an FMLA Request

Employers must be careful to timely recognize and respond to requests for FMLA leave, even if the employee never refers to the FMLA. The FMLA does not require the employee to say "FMLA" or use any other particular words in requesting leave. If an employee provides the employer with sufficient information to indicate the employee has a potentially FMLA-qualifying situation, the employer should immediately determine if the employee is

eligible. The employer must notify the employee **either verbally or in writing of eligibility** within five business days of the initial request for leave or acquiring knowledge that the employee may need leave for an FMLA qualifying condition. Each time employers are required to provide the eligibility notice, they must also provide employees with a **written rights and responsibilities notice**, notifying employees of their obligations concerning the use of FMLA leave and the consequences of failing to meet those obligations. The best way to satisfy both of these obligations is for the employer to use the prescribed Department of Labor Form WH-381.

At the same time as providing WH-381, employers should provide the form Certification of Health Care Provider for Employee's Serious Health Condition DOL Form WH-380-E. Wise employers will check the box in Section I- Employer, Question No. 4, and include a detailed description of the employee's duties on the form, so that when it is time for the employee to return, the health care provider must certify that the employee can perform those duties.

If the completed certification establishes the need for FMLA leave, the employer must then provide the Designation Notice Form WH-382, notifying the employee of whether the FMLA leave request is approved and the amount of leave that is designated and counted against the employee's FMLA entitlement. An employer may also use this form to notify the employee that the certification is incomplete or insufficient and additional information is needed.

Employers should remember that failure to provide the required notices can constitute FMLA interference and give rise to claims for damages and equitable relief.

Requiring Continuous Leave When Only Intermittent Leave is Necessary

When it is medically necessary, employees may take FMLA leave intermittently, meaning they can take leave in separate blocks of time for a single qualifying reason, or by reducing the employee's usual weekly or daily work schedule. For example, an employee may need to take two hours off every other week for a regularly scheduled blood draw related to a chronic condition.

While it might be tempting to insist that an employee take continuous leave if the employee's need for a reduced schedule or frequent absences creates challenges for the employer, in most cases that is not permissible. However, if an employer can establish that the employee's limitations in fact require continuous leave, then it would not violate the FMLA. For example, in one case, a correctional officer submitted a health care provider's certification form which showed that when she had an escalation of anxiety she was not able to function safely in her work environment, leaving herself and inmates in jeopardy. The employer determined that would be a safety hazard and required the employee to go on continuous leave even though she requested intermittent leave. Though the employee sued and alleged that was a violation of the FMLA, the court agreed with the employer's decision.

Alternatively, the FMLA's implementing regulations make clear that an employer can move an employee to another position which more readily accommodates the intermittent leave. In such circumstances, an employer can temporarily transfer the employee to an alternative job that provides the employee equivalent pay and benefits. When the employee no longer needs to continue on intermittent leave and is able to return to full-time work, the employer must place the employee in the same or an equivalent job as the job the employee left when the leave commenced.

The bottom line is that an employer should not simply jump to a conclusion where the nature and extent of leave needed is unclear. After giving an employee the opportunity to cure any deficiencies in the certification, an employer may seek clarification from the health care provider to help understand the handwriting on the medical certification or to clarify the meaning of a response, and when in doubt employers should use that process to ascertain the employee's limitations. Importantly, only another provider, an HR professional, a leave administrator or a management official can make direct contact with the health care provider to seek clarification. As always, medical information should be maintained confidentially.

Requiring FMLA Leave Be Taken in Increments of More Than an Hour

An employee may need to take FMLA leave in increments of whole weeks, single days, several hours, and in some cases even less than an hour. If an employer uses different increments for different types of leave (for example, allowing for sick leave in 30-minute increments and vacation leave in one-day increments), the employer must allow FMLA leave to be used in the smallest increment used for any other type of leave, as long as it is no more than one hour. So while your policy might require employees to take paid time off in minimum increments of four hours, you cannot require an employee to take FMLA leave in increments greater than an hour.

Intermittent FMLA Leave and Exempt Employees

Managing intermittent FMLA leave for any employee can be a challenge for employers. Managing intermittent FMLA leave for exempt employees creates even more challenges. While an employer generally cannot reduce the salary of an exempt employee based on quantity or quality of work performed, there are narrow circumstances in which it is permitted, and FMLA leave is one of

them. FMLA is unpaid leave, and the law's regulations make a specific allowance for an employer to require that a salaried exempt employee take any intermittent FMLA leave as unpaid leave. As set forth in the FMLA's implementing regulations:

> Leave taken under FMLA may be unpaid. If an employee is otherwise exempt from minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA) as a salaried executive, administrative, professional, or computer employee..., providing unpaid FMLA-qualifying leave to such an employee will not cause the employee to lose the FLSA exemption... This means that under regulations currently in effect, where an employee meets the specified duties test, is paid on a salary basis, and is paid a salary of at least the amount specified in the regulations, the employer may make deductions from the employee's salary for any hours taken as intermittent or reduced FMLA leave within a workweek, without affecting the exempt status of the employee.

Therefore, an employer is permitted to dock the pay of a salaried, exempt employee for any time spent taking intermittent FMLA leave. However, the employer is not required to do so. Because exempt employees usually work whatever hours are necessary get the job done, an employer may choose to pay the employee his/her full salary even though the employee takes intermittent leave.

If an employer does choose to dock the salary of an exempt employee for time spent taking intermittent FMLA leave, the question becomes how many hours constitute an FMLA workweek for the exempt employee. The regulations implementing the FMLA again provide the answer: where an employee takes FMLA leave intermittently or on a reduced leave schedule, the employer and employee should agree on the employee's normal schedule or average weekly hours and reduce that agreement to a written record maintained by the employer.

Ignoring the Americans with Disabilities Act When FMLA Leave is Not Available

What if your company is not covered by the FMLA and you have an employee with a medical condition that is impacting the employee's ability to work? Or what if you have an employee who has not yet qualified for the FMLA or has exhausted the leave available due to his/her own serious health condition but still cannot work? Can you simply terminate the employee?

Not without considering whether the employee's medical condition constitutes a disability within the meaning of the Americans with Disabilities Act, as amended (ADA). In many instances, a health condition that would qualify an employee for FMLA leave also constitutes a disability under the ADA. When an employee is not eligible for or has exhausted FMLA leave, the employer should consider whether the medical condition is a disability under the ADA. If so, the employer should engage in the interactive process under the ADA to determine whether there is a reasonable accommodation the employer could make which would enable the employee to perform the essential functions of the job. For example, if an employee needs two more weeks of leave to complete a 14-week chemotherapy treatment program, after which the employee's doctor says the employee should be able to resume his/her duties, then the additional leave of two weeks would likely constitute a reasonable accommodation. Prior to terminating an employee who has no FMLA leave available, it is always important to consider an accommodation under the ADA.

Key Takeaway

There are many potential FMLA traps; we've only highlighted a few. The best course of action when dealing with an FMLA issue is to contact experienced employment counsel for an individualized assessment of the employee's request or situation. For assistance with complicated FMLA

leave issues, contact your Akerman employment lawyer.
