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Overview of Common Family & Medical Leave Issues
by David Albert Pierce, Esq.

BASIC COMPLIANCE CHECKLIST:

1. Determine if the company is covered.

- For Private Sector Employers: 50 or more employee on the payroll each work day for 20 or more (consecutive or non-consecutive) workweeks in either the current or preceding calendar year.

- Once "50 or more employees/20 workweeks" threshold has been met, Employer coverage remains in effect at least for that calendar year and following calendar year.

[see FMLA section 825.104, 105; CFRA 7297.0(d)]

- "Joint Employer" definitions found in FMLA section 825.106

- "Successor in Interest" Employer definition FMLA section 825.107

2. Determine if particular work site is covered.

- Must have at least 50 employees within 75 miles of the work site in question. Miles measured by the shortest ground route not air miles. All joint employer rk sites are used in calculations.

[see FMLA section 825.111, CFRA 7297.0(e) regarding covered work sites]

3. Adopt a policy using "12 month rolling basis calculation period" and all available management optional policy language for regulating employee conduct while on leave.

- Various ways of calculating "12 weeks in a 12 month period."

1. Calendar year

2. Any fixed 12 month leave year, such as, fiscal year, employee anniversary year

3. 12 months measured forward from the date employee's first FMLA leave begins

4. Rolling 12 month period measured backward from the date employee used FMLA leave.

--- THIS IS THE ONE TO USE.

- Apply consistently and uniformly. Prior to changing system of calculating "12 weeks in a 12 month period" Employer must provide 60 days notice and any employee seeking FMLA leave retains benefit of old calculation for any 12 month transition period affecting the specific employee.

- If Employer fails to designate 12 month period, Employee is provided with period which is most beneficial to him/her.

4. Analyze effects of any corresponding state law.

- California Family Rights Act

- California pregnancy discrimination statute.

5. Post FMLA poster (and any relevant state posters).

- Use a federal composite poster (listing all federal employment posters) plus a separate California CFRA poster. If 10% or more of the work force at a particular work site speaks a language "other than English as their primary language" the leave posters must be available in that other language.

- Failure to comply with postering requirement is a $100 penalty for each violation.

[see FMLA section 825.300, CFRA 7297.4(a)(5) & 7297.9]

6. Publish FMLA policy in Employee Handbook with reference to "12 month rolling basis calculation period" and employee obligations during leave. [FMLA section 825.301]

7. Educate line supervisors about FMLA implications when disciplining or discharging employees and of need for good communication between HR and supervisor regarding <u>all</u> employee absences.

- Court jurisdictions are split on the issue of supervisor liability. However, the majority view is Supervisors can be held personally liable for FMLA violations.

- In California, Walrath v. Sprinkel (July 5, 2002) 2002 DAR 7561, the California Court of Appeals held an individual supervisor may be liable for a retaliation against employee in violation of the Fair Employment and Housing Act.

- The federal district court of Eastern Pennsylvania ruled: FMLA adopts the FLSA as a model for its regulations and under the FLSA individuals "acting in the interest of the employer are individually liable for any violations of the requirements of the statute." Thus, the same rule invoking liability to individual supervisors applies to FMLA violations.

- The federal district court of Northern Illinois ruled: Supervisors who exercise sufficient control over an employee's taking of medical leave may be held individually liable for violations of the FMLA, even if they do not exercise exclusive control over all day-to-day affairs of the employer.

- Alternatively, the federal district of Eastern Tennessee held that liability under the FMLA should not be imposed upon individuals unless the individual is the employer.

[see FMLA section 825.220, 400, CFRA 7297.8 regarding penalties for Employer interference with Employee's right to take FMLA leave]

CHECKLIST FOR EMPLOYEES WHO REQUEST LEAVE OR WHO SIMPLY TAKE TIME OFF WORK WITHOUT SAYING "FMLA"

PROCEDURES TO FOLLOW WHEN LEAVE IS REQUESTED

1. Instructed Employee to complete a Request For Leave Form.

- This form should be completed 30 days before leave is to begin when such advance notice is "foreseeable and notice to Employer is practicable" or as soon as need for leave becomes known to Employee and notice is practicable.

- Oral notice by the Employee is sufficient and an employee cannot be required to complete a Leave Request Form as a precondition to taking leave. The purpose of the Form is simply to formalize the process but does not supersede oral notification.

- In reality advance notice rarely ever happens and Employers generally can only postpone leave as a result of the employee's failure to comply in rare situations which generally do not involve the employee's own serious health condition.

- Typically, if an employee has a serious health condition which arises as an emergency, the employee must notify the Employer within 2 days of the emergency (unless, the employee is in coma or some other barrier prevents notice to the Employer).

- The more common scenario will involve the Employer telling the Employee their absence is being counted toward FMLA, rather than vice versa. Good communication between the Company & its supervisors about employee absences is essential. All too often an employee is out for several weeks before the Employer sends FMLA notice.

[see FMLA section 825.302, 303, 304 and CFRA section 7297.4 re Employee notification requirements]

2. Is employee eligible for FMLA/CFRA leave?

- Is the specific work site covered? The employee must work at a work site where there are at least 50 employees within 75 miles measured by the shortest ground route not air miles. All joint employer work sites are used in calculations.

- Has the Employee worked for the company for at least 12 months (the 12 months need not be consecutive and must be completed before the leave is actually taken) and has the Employee worked at least 1,250 hours during the 12 consecutive months before the first day of leave?

  Bona fide executive, administrative, and professional as defined in FLSA 29 CFR 541, are presumed to have worked 1250 hours.

- How much FMLA leave time has the Employee used in the last 12 months and how much additional FMLA leave time is available for this specific Employee?

- If Employer fails to advise Employee of eligibility status, employee is deemed eligible.

[see FMLA 825.110, CFRA 7297.0(e) regarding Employee eligibility]

- Holidays are counted against FMLA leave entitlement but business activity cessation for a week or longer, such as a plant shutdown during the summer or school closing during winter breaks, would not count against the FMLA leave entitlement.

[see FMLA section 825.200, CFRA section 7297.0(h), 7297.6]

- Intermittent leave or reduced schedule leave is permitted in separate blocks of time or by reducing normal work schedule. Must be for a medical necessity. Available if Employee best accommodated through an intermittent or reduced leave schedule. Employee must attempt to schedule leave so as not to disrupt the Employer's operations. Employer may require Employee to be assigned to an alternative position with equivalent pay and benefits that better the Employee's leave schedule. Employer may proportionately reduce benefits, such as paid vacation, that are based on the number of hours worked. Employee must be restored to same or equivalent position when able to return to work full-time.

[see FMLA section 825.117, 204, CFRA section 7297.3(c)-(e)]

Calculating amount of Intermittent or reduce leave: Count only the amount of leave used toward

the 12 week allotment based on smallest increment measured by company time keeping

procedure (time clock).

Ex: Full-time employee works 5 days/week, 8 hours a day. If the Employee takes 1 day off the RESULT is Employee used 1/5th of a week of FMLA.

Ex: Part-Time employee works 5 days/week, 6 hours a day. If the Employee works 20 hours reduced leave schedule a week/4 hours a day the RESULT is Employee used 1/3 week of FMLA leave.

Variable workweek schedules may be converted to an employee's normal workweek by taking a

weekly average of the hours worked over the 12 weeks prior to the beginning of leave.

[see FMLA 825.205, CFRA 7297.3(c)]

Intermittent Leave & FLSA section 541 exemption for docking pay for partial day absences: Normally FLSA prohibits partial day deductions from salaried exempt employees. However, partial day deductions will be permitted without upsetting the FLSA salaried exemption if deduction is occurring because of FMLA leave provided salaried employee still meets minimum salaried amount per week ($250.00).

[see FMLA section 825.206]

- If both spouses work for the Employer, the 12 week of FMLA leave is calculated is sometime shared by the spouse/employees.

[see FMLA section 825.202 and CFRA section for detailed explanation of how to deal with this sometimes complex subject which only arises when spouses work for the same employer]

Generally, both spouse/employees must share 12 weeks of FMLA leave in 12 month period for child birth/adoption/foster care or to care for new child in first year of the parent/child relationship. Similarly, both spouses/employees must share 12 weeks of FMLA leave to care for the spouse/employees' respective

parents with a serious health condition. Consult consul when two spouses are employed by the Company and one or both need leave.

- Special rules can apply to Employees seeking intermittent leave for "baby bonding time." Under FMLA, "baby bonding time" must be taken all at one time during the first year of the birth/adoption of foster care placement. Under CFRA, the Employee can take intermittent leave for "baby bonding time" but the Employer has the right to limit this intermittent leave to minimum durations of two weeks at a time (certain emergency situations may permit intermittent leave for durations of less than two weeks at a time---consult with counsel if the Company wishes to flex its muscle in this area).

3. Is time sought for (1) serious health condition of employee or (2) serious health condition of spouse, mother, father, child or (3) pregnancy or childbirth, or (4) care of child in first year of birth/adoption/foster care.

- "Spouse" is defined as husband or wife as recognized by state law where employee resides. FMLA recognizes "common law marriages" only in states which recognize common law marriages. "Common law marriage" is not recognized in California, however, it is possible it may be recognized if it were entered into in a state which did recognize it and then the coupled moved to California.

  [see FMLA section 825.113 , CFRA section 7297.0(l) & (p)]

- "Parents" is defined as biological parent or "In Loco Parentis." Does not include "in-laws."

- "Son or daughter" is defined as biological, adopted, foster child, stepchild, legal word or child of In Loco Parentis. Must be (1) under 18 or (2) over 18 but incapable of self-care because of mental or physical disability" as defined by ADA 29 CFR 1630.

  Employer may request confirmation of family relationship, such as employee's statement, child's birth certificate, court documents, etc.

- Do the special rules concerning pregnancy in California govern this leave [See discussion below].

- Definition of "serious health condition" - An illness, injury, impairment or physical or mental condition that involves one or more of the following:

  1. Hospital care;

  2. Absence plus treatment;

  3. Pregnancy;

  4. Chronic condition requiring treatment;

5. Permanent/long-term condition requiring supervision; or

6. Multiple treatments for non-chronic conditions.

[see FMLA section 825.114, CFRA section 7297.0(o)]

[see full definition found on Certification of Health Care Provider]

Examples of "serious health condition"- heart attacks, heart conditions requiring heart bypass,

valve operations, most cancers, back conditions requiring extensive therapy or surgical

procedures, strokes, severe respiratory conditions, asthma, diabetes, epilepsy, spinal injuries,

appendicitis, pneumonia, emphysema, severe arthritis, severe nervous disorders, Alzheimer's

disease. Injuries caused by serious accidents on or off the job, pregnancy related matters.

"Serious health condition" includes substance abuse treatment. However, Employer may

terminate employee for substance abuse regardless of FMLA if: (1) Company has established

policy, (2) policy is applied in non-discriminatory fashion, and (3) policy communicated to all

employees. CONSULT with Counsel first.

Examples of common ailments which do <u>not</u> qualify as "serious health conditions": Cosmetic

treatments (i.e. acne or plastic surgery), Common cold, Flu, Ear ache, upset stomach, minor

ulcers, headaches other than migraines, routine dental problems, periodontal disease.

[see FMLA Section 825.114(b)-(d).]

- "Needed to care for" a family member defined as physical or psychological care; covers situations where Employee may need to fill in for others who are caring for the family member, or to make arrangements for changes in care, such as transfer to a nursing home. Intermittent leave for family care may be taken if family care is needed only on an intermittent basis or family member's serious health condition is intermittent.

  [FMLA section 825.116]

- "Health Care Provider" is defined as doctors of medicine or osteopathy or podiatrists, dentists, clinical psychologists, optometrists, chiropractors, nurse practitioners, nurse-midwives and clinical social workers authorized to practice under state law, Christian Science practitioners and any health care provider recognized by the Employer or its group health plan.

  [FMLA section 825.118, CFRA section 7297.0(j)]

4. If the employee is <u>not</u> eligible to take FMLA leave, then the request for unpaid leave should be denied (unless the employer has a uniformly-applied policy to the contrary). Of course paid leave, such as sick time or vacation time may be available to the Employee. Also consider, other leave acts such as leave for military duty, parent-teacher leave, workers' compensation and short-term leave under ADA.

5. Calculate available leave allotment, identify key dates when future correspondence with employee is anticipated.

- 12 workweeks of unpaid, job protected leave.

- Earned or accrued paid leave (sick time, vacation time) may be substituted for all or any portion of the unpaid FMLA leave. FMLA provides vacation or personal paid leave may be substituted without any limitations. However, CFRA provides "only if the employee asks for the substitution of paid leave for what would be a CFRA-qualifying event may an employer require the employee to use any accrued vacation time or other paid accrued time off, other than accrued sick leave

  [CFRA 7297.5(b)(1)-(2)]

6. Complete Employer Response to Leave Form

- Provide Employee with information about the Employee's obligations to the Company while on leave, include notice and re-certification requirements, information about maintenance of health insurance benefits (also include info. about designation as " employee" if applicable— WARNING: In practice, you will in all likelihood never be able to exercise the "key employee exemption"). [see FMLA section 825.217, 218, 219 CFRA 7297.2(c)(2)]

- **THE BIG PITFALL: If the employer has the requisite knowledge to designate the leave as a FMLA leave, it must notify the employee at that time that the leave has been so designated. An employer may not designate leave that has already been taken as FMLA leave after the employee returns to work unless: (1) An employee is absent for an FMLA qualifying reason and the employer does not learn of the reason for leave until the employee returns to work (in which case leave must be designated within 2 days of the employee's return) or (2) The Employer has previously designated the leave under FMLA and is awaiting receipt from the employee of medical certification. CAUTION: Although initial notification to the Employee of the designation may be oral it must be confirmed in writing no later than the next regular pay-day. The Response Request For Leave was designated for this purpose**.

  [FMLA section 825.208(b)-(e)]

  However, note in <u>Ragsdale v. Wloverine World Wide, Inc.</u> 535 US 81 (decided March 19, 2002), the U.S. Supreme Court ruled that the DOL's regulations under section 825.208 which require an employer to give prospective notice of FMLA leave designations to be invalid as to the automatic presumption that the employee was prejudiced and therefore entitled to additional leave time. Under Ragsdale, the Court said, when an employee alleges a company failed to comply with section 825. 208, each violation must be subject to an individualized assessment to determine whether the employer's failure to designate the leave as "FMLA leave" prejudiced the employee. Under the new interpretation of this section established by the Supreme Court, an employer might be denied credit for undesignated leave afforded to an absent employee if the employee can demonstrate that, as a result of the employer's lack of notice, he or she suffered some prejudicial harm.

- Under CFRA written notice must be sent to employee as soon as practicable but no later than 10 calendar days after receiving a request for CFRA leave [CFRA section 7297.4]

  Since CFRA is patterned after FMLA, it is likely that this 10 day period will similarly not be "carved in stone" under a Ragsdale analysis. However, that issue remains to be fully litigated in state court.

- A simple notation on employee's pay stub is sufficient written notice by employer to start FMLA clock ticking [FMLA 825.208(b)(1)(2)] but long form Employer Response is much better for maximizing Employer's rights.

7. Instruct Employee to complete his/her portion of Certification of Health Care Provider Form

- Instruct Employee to have health care provider complete and return balance of Health Care Provider Form within 15 days.

- Maintain all information about the nature of the medical condition in a confidential medical file separate from the day-to-day personnel file (this can be a sealed filed within the personnel file provided the personnel file itself is maintained in a secure location).

- If question of validity of medical certification is at issue, contact employment law counsel and discuss availability of obtaining second opinion. Second opinion only available for employee's own serious health condition not health conditions of family members

[see FMLA section 825.305, 306, 307 and CFRA section 7297.0(a) & 7297.4 regarding Medical Certification]

8. Monitor key dates and send reminder notices when Employee misses certification and re-certification deadlines, periodic status reports and insurance premium deadlines.

- Re-certification can be requested every 30 days Exceptions: re-certification may be requested in intervals less than 30 days if circumstances changed significantly due to duration or frequency of absences, severity of condition, complication or Employer receives information that casts doubt upon Employee's stated reason for absences.

- Re-certification form due back to Employer within 15 days of request. No second opinions available on re-certifications. Employee pays for cost of re-certification unless Employer policy provides otherwise. [see FMLA section 825.308, 311, CFRA 7297.4 regarding Re-Certification]

- Status reports on Employee intent to Return to work may e required periodically in non-discriminatory fashion, must take into account particular leave situation of Employee. Status report is always appropriate of Employee's circumstances change regarding amount of time needed. [see FMLA section 825.309 re Status Reports]

- Fitness for Duty Reports must be uniformly applied, appropriate for particular health condition, costs paid by Employee unless Employer policy provides otherwise. Must inform Employee of need to provide Fitness For Duty Report at time of first notification to Employee. No fitness-for-duty reports permitted for employee's on intermittent leave. No second or third opinions permitted. [see FMLA section 825.310, CFRA section 7297.4(b)(2)(e)].

9. Anticipate staffing needs and devise plan as to what steps are necessary to keep the Employee's job available during the leave period.

- Employee is entitled to same or equivalent position Employee held when FMLA leave commenced.

- CFRA provides where Employee gives definite date of return at the beginning of leave, the Employee must be returned on that date. If a change in the return date occurs, the Employer must reinstate the Employee within 2 business days upon notice of the Employee's ability to return to work.

[FMLA section 825.214 825.215, CFRA 7297.0(g) and 7297.2 regarding definition of "equivalent

position and Employee's right to return to work]]

PROCEDURES FOR EMPLOYEE REQUESTING RETURN TO WORK WITHIN LEAVE

ALLOTMENT

1. Consider whether "key employee" exemption is applicable for denial of reinstatement.

- In reality this will NEVER occur, as threshold requirements for key employee exemption rarely exist. No exercise of the "key employee" exemption should be utilized without first consulting with an attorney.

[Key Employee Exemption is discussed at FMLA section 825.217, 219 and CFRA section 7297.2(c)(2)]

2. Consider whether "Fitness For Duty Exam" is needed.

- If leave was for Employee's own serious health condition, require Certification of Fitness For Return To Duty (either from the Employee's doctor and/or an in-house doctor). A Fitness For Duty Exam if performed must occur before the Employee re-commences work.

- If Fit for Duty, the employee MUST be returned to the same or an equivalent position with no loss of accrued benefits.

PROCEDURES TO FOLLOW WHEN EMPLOYEE REQUESTS EXTENSION OF LEAVE

1. Determine whether leave allotment permits extension.

2. Determine whether ADA requires extension of leave as reasonable accommodation.

3. Determine whether employee is entitled to extension pursuant to employer policy or past practice.

4. Determine insurance coverage eligibility of employee and whether COBRA becomes effective.

PROCEDURES TO FOLLOW WHEN EMPLOYEE FAILS TO RETURN TO WORK WITHIN THE AVAILABLE LEAVE ALLOTTMENT PERIOD

1. Reconfirm Employer's position under ADA and California Workers' Compensation retaliation laws.

2. Reconfirm that all proper notices where given to Employee regarding Employer's expectations AND Employee's obligations.

3. Consider terminating employee and document it as a resignation— policy should be uniform.

4. Provide the Employee with COBRA notice upon termination.

5. Keep accurate records.

- Records should include dates of leave, copies of notices furnished to employees, copy of handbook or other general literature, premium payments for employee benefits, records of dispute regarding designation.

  [see FMLA section 825.500 regarding Recordkeeping]

SPECIAL RULES GOVERNING PREGANCY IN CALIFORNIA

1. 4 months for actual pregnancy disabilities

- All Pregnant Women, regardless of when they were hired or their length of service to the employer, are entitled to four (4) months of leave for disabilities relating to pregnancy. This rule is found in a separate California law commonly referred to as the Pregnancy Disability Act (Govt. Code section 12945(b)(2)). This law applies to all employers with five or more employees.

  - ♦ The 4 months of Pregnancy Leave is not automatic, a woman is only entitled to the actual amount of time off she needs due to an actual disability which renders her unable to perform her job. Most women will not be entitled to the full 4 months off, unless they have some type of problem pregnancy.

2. Women can take pregnancy disability leave in addition to family care leave.

- In addition to the four months of leave for pregnant employees provided under the PDA, if the female employee meets the eligibility requirements of the CFRA she is entitled to an additional 12 weeks of leave to "bond and care for the baby."

    - ♦ In other words, an employees right under the California family leave law and the California pregnancy leave law are separate entitlements. A female employee could be entitled to seven (7) months of unpaid job protected leave associated with their pregnancy and birth of their children.

    - ♦ The employer's obligation to maintain and pay the Employee's group health care insurance coverage continues for only the first 12 weeks of leave for pregnant employees.

3. A limited right to refuse reinstatement exists when Pregnancy Disability Leave operates alone.

- If an employee is entitled to only Pregnancy Disability Leave and not eligible for FMLA leave, then an employer may deny reinstatement only if the employer can prove returning the employee to an equivalent position with the company would "substantially undermine the employer's ability to operate the business safely and efficiently. Obviously, since any refusal to reinstate may subject the company to liability and will be carefully scrutinized, employers should consult with counsel before refusing reinstatement.

4. Pregnant women may be entitled to a job transfer for the purpose of accommodating their disability.

- The PDA also requires an employer to transfer a pregnant women to a different positions with the company if: (1) the permanent employee requests a transfer; (2) the request is based on medical certification stating that a transfer is "medically advisable;" and (3) the transfer can be "reasonably accommodated" by the employer.

In determining whether a transfer for a pregnancy disability can be "reasonably accommodated' note that an employer is not required to create an additional unnecessary job, discharge another employee, transfer another employee with more seniority, or promote or transfer any employee who is not qualified to perform the new job.