



Labor and Employment Legal Update

The Revised Federal Family and Medical Leave Act (FMLA) Regulations and Connecticut's FMLA Rules: Potential Pitfalls for Connecticut Employers

On January 16, 2009, the newly revised federal FMLA regulations went into effect. Connecticut, however, has its own FMLA statute and regulations, which differ significantly from the federal law. The Office of Program Policy at the Connecticut Department of Labor ("CT DOL") has posted guidance comparing the revised federal FMLA regulations and Connecticut's existing regulations. The 30-page guidance document is available on the CT DOL Web site at the following link: <http://www.ctdol.state.ct.us/wgwkstnd/fmla/FMLA-Guidance.pdf>.

Noteworthy differences between the state FMLA and the new federal regulations will be an issue for employers for the foreseeable future. As a general principle, where there are differences, employers should apply whichever law is more beneficial to the employee. In many cases state and federal FMLA will both apply to the situation and leave time under the two laws will run concurrently. Integrating the state and federal FMLA laws, however, can be confusing and can present challenges when drafting a comprehensive policy.

In its recent guidance, the CT DOL determined that certain aspects of the new federal FMLA regulations are already in line with the practice of the CT DOL or are considered to be a "reasonable interpretation." For example, under both the state and federal FMLA, an employee must work for the employer for 12 months before an FMLA leave commences, and the 12 months of employment need not be consecutive. The new federal regulations state that an employer generally need not look back further than seven years in determining whether an employee has prior periods of employment that can be used toward meeting the 12-month minimum service requirement. The CT DOL opined that this approach is fair to both the employer and employee, and is a reasonable limitation on the existing state FMLA regulations, and that it will conform its enforcement practice accordingly.

Quite a few of the more significant revisions in the federal FMLA regulations, however, cannot be adopted by the CT DOL at this time. Although the CT DOL has indicated that it intends to propose revisions to the state FMLA regulations to incorporate certain provisions of the new federal FMLA regulations, anything that involves a clear change in enforcement policy needs to be implemented through the formal rulemaking process, which will take time. Further, there are a number of federal changes that the CT DOL does not plan to incorporate into the state FMLA regulations, either because there is a lack of state statutory authority or because the federal change undermines a substantive employee protection under the state FMLA. Thus, even if the state regulations are revised at some point in the future to more closely correspond with the new federal regulations, significant differences will likely remain.

Highlights of the Key Differences between the Federal and CT FMLA Regulations

At the present time, it is important for employers to be aware of the key differences between the state and federal FMLA laws and regulations and to take these into account when revising their policies and implementing FMLA leaves going forward. The following are highlights of the more significant differences:

Contacting an Employee's Health Care Provider. Under the federal FMLA, certain

representatives of the employer (such as a human resources person or third-party leave administrator) may contact an employee's health care provider for clarification and authentication, but the CT FMLA does not allow this.

Fitness for Duty Certification. Under the federal FMLA, an employer can request a detailed fitness for duty certification, but under the Connecticut regulations, an employee need only provide a simple statement of his or her ability to return to work.

Notice Requirement. The Eligibility Notice and the Designation Notice must be provided to an employee within two business days under state FMLA, not five days as allowed under the federal FMLA.

Federal Forms. The new federal medical certification forms, WH-380E and WH-380F, may be used when requesting medical certification for a leave under state FMLA, but Connecticut employers may not request a "diagnosis" and the forms should be modified accordingly. An employer may use the new federal FMLA Eligibility Notice and Designation Notice forms but must adjust the forms to account for the differences in CT FMLA law.

Employee Notice Requirement. The federal regulations impose more stringent employee notice requirements, but under the Connecticut regulations, employees are only required to give timely verbal or other notice.

Military Family Leave. The federal FMLA now includes new military family leave entitlements. These types of leave are not a part of the CT FMLA law at this time but still must be followed by federal FMLA-eligible employers in Connecticut.

Spouse Eligibility. The federal FMLA provides for leave for both the mother and father for the birth of a child, but the CT FMLA allows any "eligible employee" to take leave for the birth of a child, applying the rule to parents generally and allowing for the possibility of two mothers or two fathers, pursuant to Connecticut's recognition of same-sex civil union partnerships and marriage.

"Key Employee" Exception. Unlike the federal FMLA, the CT FMLA does not have a "key employee" exception. If federal forms are utilized for periods of leave covered by CT FMLA, any references to the key employee exception should be eliminated.

Return to Work. The CT FMLA requires that an employee be reinstated to his or her original position unless the position is unavailable; the federal FMLA permits reinstatement to the same or equivalent position. Where a period of leave is governed solely by federal FMLA (such as a period of military family leave), employers may find it beneficial to apply the federal standard and may therefore wish to explain the difference in their policy.

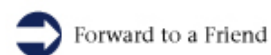
Bonus/Attendance Awards. The federal FMLA allows employers to deny employees bonuses or awards if goals are not met because of a FMLA absence from work. The CT FMLA does not allow this.

What Should Companies Do Now?

Companies subject to both the federal and CT FMLA should review their FMLA policies, forms, and procedures, not only to comply with the new federal regulations but also to ensure compliance with the state FMLA law. While it is likely that the CT DOL will propose some changes to the CT FMLA regulations to align them more closely with the federal regulations, this will take time and, as noted, significant differences between the two laws likely will remain.

If you have any questions regarding the interplay between the federal and Connecticut FMLA or if you would like assistance revising your FMLA policies and/or forms, please contact Alice E. DeTora (adetora@rc.com) at (860) 275-8234 or Jean E. Tomasco (jtomasco@rc.com) at (860) 275-8323.

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