

FMLA-RELATED UPDATES FROM THE DOL: NEW OPINION LETTERS AND (KIND OF) NEW FORMS

Sep 17, 2018

The U.S. Department of Labor (“DOL”) recently released two new opinion letters relating to the Family and Medical Leave Act (“FMLA”), which provides eligible employees the right to unpaid, job-protected leave for certain family and medical reasons. The DOL also issued “new” forms relating to FMLA leave, which should be used on a going-forward basis.

The full opinion letters are available [here](#) and [here](#), and the new forms are available [here](#).

Organ Donors

In the first opinion letter, the DOL addressed the question of whether leave resulting from organ donation, including post-operative treatment, could qualify for FMLA leave. The brief answer: Yes, so long as the need for leave meets the FMLA’s definition of serious health condition. An employee’s organ donation can qualify as a serious health condition when it involves “inpatient care” or “continuing treatment.” See 29 C.F.R. §§ 825.114, .115. And, since an organ donation would qualify as a serious health condition *whenever* it results in an overnight stay in a hospital – which is commonly involved in such donation – it is likely that the FMLA would apply.

Importantly, the *reason* for the organ donation – e.g., the fact that the organ donor is in good health before the donation or chooses to donate the organ solely to improve someone else’s health – played no bearing in the DOL’s response. The takeaway: The DOL is not going to delve into the reason someone has a serious health condition requiring leave (and neither should the employer). That is, even if the need for leave from work results from a “voluntary” serious health condition, the situation can be protected by the FMLA.

No-Fault Attendance Policies

In the second opinion letter, the DOL analyzed a common type of “no-fault” attendance policy pursuant to which an employee receives attendance “points” for absences and tardies, with discipline resulting when an employee reaches various point levels over time, and, conversely, with points “falling off” the record as time passes. The question at issue was whether an employer

could “freeze” the points during an employee’s FMLA leave, such that the employee neither incurs additional points nor sees any points “fall off” during that time.

The DOL concluded that such a policy is permissible, so long as the employer treats employees taking other types of leave the same. The DOL reasoned that employees on FMLA leave are not entitled to superior benefits than others, and that the removal of attendance points over time is a type of employment benefit. Accordingly, so long as the employer applies a consistent – i.e., non-discriminatory – policy under which points are frozen for all employees on equivalent types of leave (not just those on FMLA leave), the policy is permissible.

New FMLA Forms

The new forms are identical to the old forms, with the exception of an updated expiration date (now, August 31, 2021). This is a good time to check and make sure you’re using the correct forms.

Bryan Cave Leighton Paisner LLP has a team of knowledgeable lawyers and other professionals prepared to help employers assess their employment practices. If you or your organization would like more information on these updates or any other employment issue, please contact an attorney in the Employment and Labor practice group.

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