The Business Magazine
For The Chief Legal Officer

CORPORATE counsel

corpcounsel.com • April 2007

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ON THE JOB

LEGAL MANAGER/
LABOR &
EMPLOYMENT

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Staying Above Water

FMLA rules are swirling in a sea of confusion. Here's what your company can do in the meantime.

GT'S ROUGH WATERS for companies covered by the Family and Medical Leave Act of 1993 (FMLA), with lawsuits on the rise and changes in the works.

This may seem surprising, because the act has a seemingly straightforward goal—to provide eligible employees 12 weeks of unpaid leave in a 12-month period to care for themselves or immediate family members with a serious health condition, for the birth and care of a newborn, and/or for the placement and care of a foster or adopted child. Simple enough. But the law continually presents legal and human resource challenges for employers.

For example, the U.S. Department of Labor regulations and advisory opinions have been inconsistent and often difficult to apply to a specific set of facts. On top of this, the U.S. Supreme Court invalidated one FMLA regulation in *Ragsdale* v. *Wolverine World Wide, Inc.*, and federal appeals courts have found others to be invalid.

The large number of employees affected by the FMLA further complicates the situation. The Labor Department estimates that, as of 2005, more than 94 million employees were employed at FMLA–covered work sites, and more than 76 million of those workers were eligible for leave. Labor also approximates that some 6.1 million covered and eligible employees took FMLA leave in 2005. At large companies, employees taking FMLA constituted roughly 9.5 percent of the eligible workforce in 2005, according to a survey by human resources nonprofit WorldatWork.

Recognizing the challenging landscape that employers must navigate, in December 2006 Labor solicited comment on 12 different FMLA issues that have, through litigation, produced varying interpretations of the law and its regulations.

Those issues covered a number of concerns. One issue is how to count the 12 months of service required for employee eligibility to take leave. Another is how to address employee eligibility for leave if the employee reaches the 12-month threshold of service after the leave commences. Whether to count light duty assignments toward an employee's FMLA entitlement, which at least two courts have done, is also an important question. But there are many other persistent problems, including determining whether an eligible employee has a "serious" health condition covered by the FMLA.

While Congress never intended minor, short-term illnesses with brief treatment and recovery to be covered, the reality is that employers sometimes grant FMLA leave to employees with minor illnesses such as colds or the flu.

The Labor Department's regulation on serious health conditions, however, states that the common cold, the flu, earaches, upset stomachs, and other minor illnesses *ordinarily* do not meet the

definition of a serious health condition unless complications arise. But, as a Labor advisory opinion states, these conditions can constitute a serious health condition if they incapacitate employees for more than three consecutive days and require two or more health care provider visits, or one visit resulting in a regimen of continuing treatment and supervision. Employers thus may risk legal exposure in denying FMLA leave for some minor illnesses, or end up granting FMLA leave for almost any illness.

Employers also grapple with recognizing when an employee is requesting leave that may be covered by the FMLA. For instance, an employee might call in sick or leave early claiming stress. Are these employee statements sufficient to put an employer on notice that the employee may be eligible for FMLA leave? You might be surprised to hear that courts have come to different conclusions.

In other situations, FMLA's applicability is even less apparent. Victims of domestic violence or stalking may have qualifying serious health conditions depending on how they are affected. Similarly, alcoholism can constitute a serious health condition if the leave is taken for treatment of the condition and help is provided by a health care or other approved provider. FMLA leave is not required, however, for absences due to an employee's use of alcohol.

Intermittent leave also presents challenges, with almost one-quarter of covered and eligible workers taking this type of FMLA leave, according to the department. Problems arise when employees take intermittent leave with little or no notice, leaving coworkers to pick up extra work or production to suffer. Tracking time off creates headaches for many employers, especially since they may count only actual time taken off from work toward the FMLA entitlement.

Even waiving FMLA rights has become a minefield. The current regulation prohibits employees from waiving their rights under the FMLA without prior Labor approval. While most courts addressing the issue have found this waiver to apply to prospective rights only, the U.S. Court of Appeals for the Fourth Circuit, in *Taylor* v. *Progress Energy, Inc.*, initially interpreted the regulation as also prohibiting settlement of FMLA claims without Labor's prior approval. In June 2006 the Fourth Circuit vacated its ruling on the issue and granted rehearing. The case is pending, and Labor has filed an amicus brief stating that the regulation only should apply to prospective rights.

While employers face a wave of confusion over existing FMLA mandates, the government could turn the tide yet again. In addition to likely updated regulations, legislation proposed by Senator Christopher Dodd aims to provide six weeks of *paid* leave when an employee takes leave for his own serious health condition, or to take care of a parent, spouse, or child with a serious health condition. The senator also intends to broaden the reach of the FMLA, which now only covers employers with 50 or more employees. Arguing for change, Dodd points to the recent study by McGill and Harvard University showing that the United States lags behind other industrialized countries in providing paid sick and maternity leave.

Updates and clarifications—which could be made in months or even years—should not stop counsel, in the meantime, from taking steps to ensure their companies have an appropriate plan in place for identifying, evaluating, and processing FMLA requests. Here are some tips.

1. Place the company's FMLA policy in an employee handbook and post FMLA notices with other employer notices. If a significant number of your company's workforce cannot read English, also provide the FMLA notice in a language those employees can read.

2. Train personnel to recognize an employee request for FMLA leave. There are no magic words that an employee must use, and even seemingly minor illnesses may qualify for FMLA leave under certain circumstances.

3. Check that the company has standardized forms for processing FMLA claims. These forms may include: application for FMLA leave, employer response to request for FMLA leave, and certificate of ability to return to work.

4. Ensure that personnel responding to FMLA requests understand the time frames for employee provision of information and for employer responses.

5. Advise personnel evaluating the FMLA requests to consult counsel with any questions about employee eligibility for leave. Too often managers improperly deny FMLA leave to eligible employees.

6. Track intermittent leave, reduced leave, the need for recertification of a serious health condition, etc. Ensure that workers understand both the employer's and the employee's obligations.

Despite a sea of uncertainty with the FMLA, employers can work to stay on course with their policies. Doing so will help maintain a productive workforce and ultimately avoid litigation.

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