

June 30, 2010

Labor & Employment Bulletin

PRESSING EMPLOYMENT POLICY CONCERNS — LEAVE LAW UPDATE

Employers should take note of three important events that could affect their leave of absence policies. Two of the events occurred last week, and one takes effect this week. On June 22, 2010, the Ohio Supreme Court held that employers can enforce minimum length of service requirements on pregnant employees. The next day, the U.S. Department of Labor (“DOL”) expanded its interpretation of the term “son or daughter” for purposes of the federal Family and Medical Leave Act (“FMLA”), significantly expanding the number of employees who may be able to take FMLA leave for a child’s serious health condition. Finally, Ohio’s new military leave law will become effective July 2. That law will provide many Ohio employees leave similar to what they can receive for qualifying military exigencies under the FMLA.

Ohio Supreme Court Rules that Pregnant Employees Who Fail to Meet Minimum Service Requirements Are Not Entitled to Leave

The Ohio Civil Rights Act prohibits employers from taking adverse employment actions against employees based on, among other classifications, their sex. In particular, the Act requires that employers treat pregnant and non-pregnant employees equally. For years, the Ohio Civil Rights Commission (“OCRC”) had taken the position that pregnant women were entitled to

reasonable leave (generally regarded as 12 weeks) regardless of the minimum length of service requirements contained in their employers’ leave policies. During that time, the OCRC successfully argued in lower courts that an employer’s enforcing a minimum length of service requirement on employees desiring leave because of their pregnancy was direct evidence of sex discrimination. However, in *McFee v. Nursing Care Management*, the Ohio Supreme Court rejected the OCRC position, holding that an employer’s leave policy that includes mandatory length of service requirements with no exception for pregnancy or related medical conditions is not direct evidence of sex discrimination.

Eight months into her employment, Tiffany McFee presented her employer with a doctor’s note indicating that she could not work due to a condition related to her pregnancy. Although she was ineligible for leave under the employer’s FMLA policy because she had not yet completed a year of service, McFee did not come to work, and her employer terminated her employment.

McFee filed a lawsuit against her employer claiming that her employer’s enforcement of the leave policy was direct evidence of unlawful sex discrimination. The trial court agreed with the employer’s position that its FMLA policy was not discriminatory. The court of appeals reversed, relying on the following OCRC rule: “[w]here

termination of employment of an employee who is temporarily disabled due to pregnancy or related condition is caused by an employment policy under which insufficient or no maternity leave is available, such termination shall constitute unlawful sex discrimination.”

In reversing the court of appeals, the Supreme Court held that the employer provided sufficient leave for pregnancy and related conditions, but McFee was ineligible for the leave because she failed to meet the policy’s minimum length of service requirements. The Court found that minimum length of service requirements, when applied in a uniform and pregnancy-neutral manner, did not constitute direct evidence of sex discrimination under Ohio law because they do not discriminate against women on account of their pregnancy or related conditions.

This case is an important victory for employers. Although employers may now carefully impose minimum length of service requirements on pregnant employees seeking medical leave, employers must treat pregnant and non-pregnant employees alike. In addition, employers—even small employers who are not covered under the FMLA—must continue to keep in mind the prohibition against the termination of an employee taking leave for pregnancy or related conditions when insufficient or no maternity leave is available.

DOL Expands Interpretation of “Son or Daughter”

The DOL's new interpretation of “son or daughter” expands the parent-child relationship for purposes of the FMLA more broadly than the traditional biological or adoptive sense. Now, a “son or daughter” relationship can be established in *loco parentis*, “where the employee intends to assume the responsibilities of a parent with regard to a child.” According to the DOL, “[e]ither day-to-day care or financial support may establish an in *loco parentis* relationship,” cautioning that “[i]n all cases, whether an employee stands in *loco parentis* to a child will depend on the particular facts.” According to the DOL's press release, even when a child has a biological parent in the home, a non-biological parent may still share a “son or daughter” relationship with him or her in *loco parentis*, for the purpose of taking FMLA leave.

Under the DOL's new interpretation, employees who might otherwise not have been eligible for leave due to a family member's “serious health condition” will now be eligible for leave under the FMLA. These employees can include companions of biological/adoptive parent, close neighbors, aunts, uncles, cousins and close friends. Virtually anyone who provides day-to-day care or financial support should be able to qualify. According to Secretary of Labor Hilda Solis, the DOL is taking the position that, “[a]ll families, including LGBT (lesbian-gay-bisexual-transgender) families, are protected by the FMLA.”

The DOL's new interpretation specifically provides that an in *loco parentis* relationship is *fact specific*, meaning that the facts of each request for leave due to the serious health condition of an employee's child must be carefully considered. That means that employers, not the DOL, must inquire as to the nature of an employee's relationship with a child, and make calls whether any particular relationship is close enough.

Ohio Military Leave Law

Sub. House Bill 48 (“H.B. 48” or the “Bill”), effective July 2, 2010, requires Ohio employers with fifty or more employees to provide unpaid leave up to ten days or eighty hours, whichever is less, to parents, legal guardians, and spouses of soldiers who are wounded or called into active duty. Although many Ohio employers with fifty or more employees are already required to provide FMLA benefits (including leave) to employees whose family members have a “qualifying exigency” related to military service, the Bill will provide benefits to some additional employees. Moreover, although the Bill's sponsor takes the position that the leave under H.B. 48 runs concurrently with FMLA leave, the language of the Bill leaves open the possible interpretation that the new military leave entitlement is an additional benefit separate and apart from FMLA leave and available to employees who previously exhausted their FMLA leave benefit.

H.B. 48 requires employers to permit employees, once per calendar year, to take leave up to ten days or eighty hours, whichever is less, if the following conditions are satisfied:

- The employee has been employed by the employer for at least twelve months and has worked at least 1,250 hours for the employer in the previous twelve months.
- The employee is the parent, spouse, or a person who has or had legal custody of a person who is a member of the uniformed services and is called into active duty for a period of longer than thirty days or is injured, wounded, or hospitalized while serving on active duty.
- The employee gives proper notice of the leave.
- For deployments, the leave is taken no more than two weeks prior to, or one week after, the deployment date.

- The employee does not have any other leave available for use, except sick leave or disability leave.

Like the FMLA, the Bill provides unpaid leave, job restoration benefits, and prohibits retaliation for taking leave. However, unlike the FMLA, H.B. 48 does not limit its definition of “eligible employee” to those employees who work at worksites with “fifty or more employees working within seventy-five miles of the worksite.” Employees who are not “eligible” for FMLA benefits solely due to the seventy-five mile radius limitation will now be covered under the Bill.

H.B. 48 is unclear regarding whether it is intended to provide supplemental leave in addition to that already provided under the FMLA, or whether the leave provided for under H.B. 48 is to run concurrently with existing FMLA military leave. Under the Bill, Ohio employees are entitled to ten days or eighty hours of unpaid leave to care for an injured soldier if the employee “does not have any other leave available for the employee's use except sick leave or disability leave.” Based on the language of the Bill, employees could exhaust all of their unpaid leave under the FMLA and use the new provisions of H.B. 48 as a supplemental tool to gain an additional ten days or eighty hours of unpaid leave, whichever is less. Despite this language, the House Speaker's Office and the Ohio Legislative Service Commission have both indicated that the new leave is intended to run concurrently with the leave already provided under the FMLA. However, employers should be alert to the possibility that this provision may be challenged in the courts by employees seeking to tack on additional leave after having exhausted their FMLA benefit.

Additional Information

Employers should reevaluate their leave policies and practices to reflect these three matters. If you have any questions on your company's leave policy, or would like to discuss the impact of these changes on your policies, please contact any of the following members of Benesch's Labor & Employment Practice Group:

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