

WEST SOUND HUMAN RESOURCES MANAGEMENT
ASSOCIATION

MANAGING LEAVE ISSUES


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WHAT AM I DOING HERE?


- New Federal FMLA Regulations
- New Federal Definition of Disability
- Uniformed Services Employment and Reemployment Rights Act (USERRA)
- COBRA and the American Recovery and Reinvestment Act (the Stimulus Plan)
- Some Random Thoughts about Managing Leave
- Questions and (hopefully) Answers

New Federal FMLA Regulations


- First the Basics
 - Federal FMLA
 - 50 or more employees in 20 or more workweeks in the current or preceding calendar year
 - Worked for one year
 - Worked 1,250 hours over previous 12 months



- **Washington State FMLA**
 - 50 or more employees at the worksite where the employee requesting the leave reports or works within 75 miles of the employee's worksite
 - Worked for one year
 - Worked 1,250 hours over previous 12 months
 - Washington State FMLA mirrors federal FMLA in key provisions




- **Covered Employees are Entitled to 12 Workweeks of Unpaid Leave for:**
 - Birth of a child and to care for the child
 - Placement of an adopted or foster child
 - To care for a family member with a "serious health condition"
 - A "serious health condition" that makes the employee unable to perform the functions of his or her job




New Federal FMLA Regulation Adds Two New Entitlements:

1. Up to 12 weeks of unpaid leave for certain "qualifying exigencies" arising out of a covered military member's active duty status, or notification of an impending call or order to active duty status, in support of a contingency operation




2. Up to 26 weeks of leave in a single 12-month period to care for a covered service member recovering from a serious injury or illness incurred in the line of duty on active duty. Eligible employees are entitled to a combined total of up to 26 weeks of all types of FMLA leave during the single 12-month period.



What are "Qualifying Exigencies?"

- Short-notice deployment
- Military events and related activities
- Childcare and school activities
- Financial and legal arrangements
- Counseling
- Rest and recuperation
- Post-deployment activities
- Additional activities not encompassed in the other categories, but agreed to by the employer and employee



Other Important Changes in the New FMLA Regulation

- Light Duty
- "Serious Health Condition"
- Substitution of Paid Leave
- Employer Notice Obligations
- Employee Notice
- Medical Certifications
 - Content
 - Timing
 - Fitness for Duty

Definitions of Disability

State Definition of Disability

- (25)(a) *Disability means the presence of a sensory, mental, or physical impairment that:*
- (i) Is medically cognizable or diagnosable; or*
 - (ii) Exists as a record or history; or*
 - (iii) Is perceived to exist whether or not it exists in fact.*
- (b) A disability exists whether it is temporary or permanent, common or uncommon, mitigated or unmitigated, or whether or not it limits the ability to work generally or work at a particular job or whether or not it limits any other activity within the scope of this chapter.*
- (c) For purposes of this definition, "impairment" includes, but is not limited to:*
- (i) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitor-urinary, hemic and lymphatic, skin, and endocrine; or*
 - (ii) Any mental, developmental, traumatic, or psychological disorder, including but not limited to cognitive limitation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.*

RCW 49.60.040 (as amended in 2007)

State Definition of Disability (cont.)

- (d) Only for the purposes of qualifying for reasonable accommodation in employment, an impairment must be known or shown through an interactive process to exist in fact and:*
- (i) The impairment must have a substantially limiting effect upon the individual's ability to perform his or her job, the individual's ability to apply or be considered for a job, or the individual's access to equal benefits, privileges, or terms or conditions of employment; or*
 - (ii) The employee must have put the employer on notice of the existence of an impairment, and medical documentation must establish a reasonable likelihood that engaging in job functions without an accommodation would aggravate the impairment to the extent that it would create a substantially limiting effect.*
- (e) For purposes of (d) of this subsection, a limitation is not substantial if it has only a trivial effect.*

RCW 49.60.040 (as amended in 2007)



Federal Definition of Disability

DEFINITION OF DISABILITY

As used in this Act:


1. Disability – the term “disability” means, with respect to an individual –
 - (a) a physical or mental impairment that substantially limits one or more major life activities of such individual;
 - (b) a record of such an impairment;
 - (c) being regarded as having such an impairment (as described in paragraph (3))




2. (a) in general – for purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.
 - (b) major bodily functions. For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.



3. (a) an individual meets the requirement of “being regarded as having such an impairment” if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.
 - (b) paragraph (1)(c) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.



(4) The definition of "disability" in paragraph (1) shall be construed in accordance with the following:

- A. The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.
- B. The term "substantially limits" shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.
- C. An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.


D. An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

E. (i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as

- I. Medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eye glasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;
- II. Use of assistive technology;
- III. Reasonable accommodations or auxiliary aids or services; or
- IV. Learned behavioral or adaptive neurological modifications.


(ii) The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

(iii) As used in this subparagraph –

- I. the term "ordinary eyeglasses or contact lenses" means lenses that are intended to fully correct visual acuity or eliminate refractive error; and
- II. the term "low vision devices" means devices that magnify, enhance or otherwise augment a visual image.



When Does USERRA Apply?

- Applies to all employers
- No exceptions based on length of employment
- Employee must give notice of military service
- Employee's service must have been under "honorable conditions"
- Employee must report back for re-employment in a timely manner
 - 30 days or less of military service, next shift following travel time plus 8 hours of rest
 - 31-180 days, within 14 days
 - 181 days or more, within 90 days



Employees Rights Under USERRA

- Entitled to Re-employment with Same Status
- Discharge Only for Cause for 1 Year After Re-employment
- Escalating Benefits
- Retraining if Necessary



Defenses to a USERRA Claim

- Employer Has a Change in Circumstances that Would Make Re-employment Impossible or Unreasonable
- Re-Employment of a Disabled Person Would Pose Undue Hardship on the Employer
- Initial Employment is Brief and Person Would Not Have Had an Expectation of Returning



Stimulating COBRA

- The recent Stimulus Plan (the American Recovery and Reinvestment Act -- ARRA) enacted by Congress and signed by President Obama included changes to COBRA
- "Assistance eligible individuals" are only required to pay 35% of the applicable COBRA premium for a period of up to 9 months beginning with the first period of COBRA coverage on or after February 17, 2009. Employers are required to pay the remaining 65% of the premium and are to be reimbursed by the government, generally through a credit against withholding and FICA taxes with respect to its employees.
- "Assistance eligible individuals" who are eligible for the premium subsidy are defined as:
 - Individuals who are or were eligible for COBRA continuation coverage; and
 - Who lost or lose coverage under their employer-sponsored group health plan due to involuntary termination of employment between September 1, 2008 and December 31, 2009; and
 - Who elect COBRA continuation coverage.




Other Points Worth Knowing


- "Assistance eligible individuals" who are eligible for the subsidy include not only involuntary terminated individuals, but any qualified beneficiary associated with the relevant qualified employee (like a dependent of an employee who was covered immediately prior to the qualifying event).
- Premium subsidies are not limited to individuals affected by layoff, but appear to include those affected by any type of involuntary loss of employment -- including for misconduct unless it is disqualifying gross misconduct.




- ARRA requires that employers locate "assistance eligible individuals" who lost coverage due to an eligible employment termination between September 1, 2008 and the enactment of ARRA who were previously eligible to elect COBRA coverage but did not accept it, and notify them of their right to subsidized COBRA coverage and other matters specified in the ARRA.
- There is no premium reduction or subsidy for periods of COBRA coverage before February 17, 2009, and ARRA does not extend or change the length of COBRA coverage.



- Other COBRA changes addressed in ARRA that impact employers include:
 - Employers must refund partial premiums for qualified individuals who pay or have paid more in premiums than they are now required to pay under the Act's subsidy provisions.
 - The ability of "assistance eligible individuals" to select coverage different than they had while employed, under certain circumstances, as long as the premium is no greater than the previous coverage.



- The COBRA changes in ARRA are also applicable to continuation coverage that may be required by comparable state law (e.g.) for small employers or health plans maintained by federal or state government. They do not apply to FSAs (flexible spending accounts).
- Employers need to modify their current COBRA election notices to comply with the Act, including informing former employees about the availability of the subsidy.



Random Thoughts about Managing Leave

- Despite the technical nature of FMLA and other statutes, the law generally recognizes the legitimate needs of the employer.
- FMLA and USERRA leave is a right, not a privilege.
- Violating those rights can have real consequences.

