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2009 ISSUE 3

AMENDMENTS TO THE FAMILY MEDICAL LEAVE ACT by Eric D. Wade

There have been recent amendments to the Family Medical Leave Act ("FMLA"). The amendments bring about a number of changes to the FMLA and result in an immediate need for school districts to update their existing FMLA policies. The most significant changes to the FMLA are created by the National Defense Authorization Act for Fiscal Year 2008 ("NDAA"), which expands the leave entitlements available under the FMLA by creating two new reasons for which eligible employees may take leave. These new leave entitlements are known as "active duty leave" and "military caregiver leave." Before discussing the details of these new leave entitlements, an overview of the FMLA may be helpful.

Overview

The FMLA is a well-known federal labor law that permits eligible employees of covered employers the opportunity to take up to 12

workweeks of unpaid leave with job protection during a 12-month period for certain qualifying reasons. The concept of "job protection" is at the heart of the FMLA, which aims to help eligible employees meet the demands of family and health without fear of being terminated or forced into a lower position upon returning to work. Thus, after taking FMLA leave, an eligible employee is entitled to be reinstated to the same or an equivalent position.

All public agencies, including all public schools, are covered employers under the FMLA. Generally speaking, eligible employees are those who have been employed for at least one year by the covered employer, have worked at least 1,250 hours during the previous 12 month period, and have requested leave for a reason covered by the FMLA.

Traditionally, there have been three qualifying reasons for which an eligible em-

ployee could take up to 12 workweeks of unpaid leave under the FMLA. First, for the birth of a child or to care for such child, or placement for adoption or foster care of a child. Second, to care for a spouse, child or parent with a serious health condition. Third, for the employee's own serious health condition that makes the employee unable to perform the functions of his or her job. These reasons remain fully valid under the amended FMLA. In addition, as discussed above, the NDAA has expanded the leave entitlements available to employees by adding two new reasons for which FMLA leave may be taken by eligible employees.

Active Duty Leave

The NDAA amends the FMLA to permit eligible employees to take up to 12 workweeks of unpaid leave during a 12-month period for any "qualifying exi-

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OKLAHOMA'S PIONEER IN LEGAL EXCELLENCE



AMENDMENTS TO THE FAMILY MEDICAL LEAVE ACT (CONTINUED FROM PAGE 1)

gency” arising out of the fact that the spouse, child or parent of the employee is a servicemember of the National Guard or Reserves and is on active duty or has been called to active duty in support of a contingency operation. This

is known as “active duty” or “qualifying exigency” leave. The United States Department of Labor has issued

regulations that provide numerous examples of “qualifying exigencies.” Those examples include, but are not limited to, the following:

- ◆ Short-notice deployment activities (i.e., notice given seven days or less before deployment);
- ◆ Military events and related activities, such as attendance at official ceremonies, programs or events sponsored by the military that are related to the servicemember’s active duty or call to active duty;
- ◆ Childcare and school activities for the servicemember’s child or children;
- ◆ Making financial and legal arrangements to address the servicemember’s absence while on active duty;
- ◆ Attending counseling for needs arising from the servicemember’s active duty;
- ◆ Rest and recuperation periods when the employee can spend time (up to five days) with a servicemember who is on short-term, temporary rest and recuperation leave during a period of deployment;
- ◆ Post-deployment activities, such as attendance at arrival ceremonies and reintegration briefings sponsored by the military that occur within 90 days after termination of active duty, or to address issues arising from a servicemember’s death while on active duty; and
- ◆ Any other event that the employee and employer agree is a “qualifying exigency.”

Military Caregiver Leave

Perhaps the single most significant amendment to the FMLA is the military caregiver leave provision. The NDAA amends the FMLA to permit a spouse, son, daughter, parent, or “next of kin” of a covered servicemember with a serious injury or illness to take up to 26 workweeks of leave to care for the servicemember. A covered servicemember is a current member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation or therapy, is in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness that

was incurred in the line of duty and while on active duty.

The military caregiver leave provision differs from the other leave entitlements under the FMLA in two key respects. First, an eligible employee can take military caregiver leave for up to a total of 26 workweeks during a single 12-month period. This is more than twice the amount of leave (i.e., 12 workweeks) available for all other qualifying reasons. Second, military caregiver leave applies to a broader group of family members than other types of leave under FMLA because it includes “next of kin,” which is defined to mean the nearest blood relative of the covered servicemember. This opens up the possibility of FMLA leave eligibility for employees who are siblings, aunts, uncles, cousins and grandparents of covered servicemembers.

Other Amendments and Additional Considerations

FMLA leave may be taken intermittently for a qualifying exigency arising out of the active duty status of a covered servicemember. FMLA leave also may be taken intermittently whenever medically necessary to care for a covered servicemember with a serious injury or illness. When leave is needed for planned medical

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“These new leave entitlements are known as “active duty leave” and “military caregiver leave.”

AMENDMENTS TO THE FAMILY MEDICAL LEAVE ACT (CONTINUED FROM PAGE 2)

treatment, the employee must make a reasonable effort to schedule treatment so as to not unduly disrupt the employer's operations. Eligible employees must provide at least 30 days' notice of their intention to take active duty leave or military caregiver leaver whenever the necessity for such leave is foreseeable. Otherwise, notice of leave must be reasonable and practicable under the circumstances.

The FMLA amendments clarify that eligible employees are entitled to take a combined total of 26 workweeks of unpaid FMLA leave during a 12-month period. This means that if an eligible employee wishes to take 12 workweeks of leave for the birth of a child and to care for such child, and then later during the same 12-month period, the

employee's spouse is seriously injured in the line of duty and while on active duty, then the employee can take an additional 14 workweeks of leave under the military caregiver leave provision, for a total of 26 workweeks of leave during that 12-month period of time.

Under certain conditions, an employee may choose to take (or an employer may require an employee to take) accrued paid leave, such as sick leave, concurrently with unpaid FMLA leave. It is always beneficial to an employer for employees to take accrued paid leave concurrently with unpaid FMLA leave. An employee's ability to take paid leave concurrently with unpaid FMLA leave is determined by the terms and conditions of the employer's leave policies.

There are other amendments to the FMLA in addition to those discussed above. For example, there are amendments designed to improve communication between employees, employers and health care providers. In addition, there are amendments that provide needed

clarity for both employers and employees about their responsibilities and rights under the FMLA. The best way to ensure that your school district is fully up-to-date on all of the new changes and in full compliance with the law is to get an updated FMLA policy from your school lawyer.



"It is always beneficial to an employer for employees to take accrued paid leave concurrently with unpaid FMLA leave."

POLICY REVIEW

School districts need to review (or create, as appropriate) the following policies as a result of state and federal legislation, regulation or guidance over the past year.

- ◆ Identity theft (Red Flag Rules) policy (16 C.F.R. § 681.1 et seq.) (note that the deadline for adoption has been extended to August 1, 2009)
- ◆ Parent notice of school

sponsored or school directed and controlled student organizations (Okla. HB 1826)

- ◆ Records retention and destruction (federal rule changes impacting electronically stored information)
- ◆ Harassment and retaliation policies: sexual and other harassment, intimidation, bullying and threatening behavior

based upon protected category (not a result of legislation, but OCR guidance)

- ◆ Grievance procedure and grievance complaint form (not a result of legislation, but OCR guidance)
- ◆ Nondiscrimination statement, including annual notice of coordinators (not a result of legisla-

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RFR SPEAKER SHOWCASE

ANDREA KUNKEL will be presenting a special education workshop for OSSBA on October 26 in OKC.

JOHN MOYER AND KAREN LONG are making a presentation to the Oklahoma Schools Advisory Council in Muskogee on Monday, August 10, 2009.

JOHN MOYER will be making a presentation at the Annual OSSBA/CCOSA Conference in OKC at the Cox Communications Center on Friday, August 28, 2009 from 8:30 to 9:30 a.m. on "The Board's Role in Employment and Due Process."

JOHN MOYER AND BRYAN DRUMMOND are going to do an OSSBA Employment Law seminar at the Embassy Suites in Tulsa on September 24, 2009.

POLICY REVIEW (CONTINUED FROM PAGE 3)

- tion, but OCR guidance)
- ♦ Criminal background check requirements (2008 state legislation still not known by many school districts)
- ♦ Section 504/Title II, including forms related to educational services for students (Americans with Disabilities Act Amendments of 2008)
- ♦ Student Records / FERPA (amended FERPA regulations)
- ♦ Staff professional conduct with regard to reporting misconduct and overnight trips (not a result of legislation, but litigation)
- ♦ Student suspension because of physical harm or threatened harm to school employee or volunteer (Okla. HB 1598)
- ♦ Activity absences (recent State Board of Education action)
- ♦ FMLA (National Defense Reauthorization Act of 2008)
- ♦ Contracts and policies regarding temporary teacher status (Okla. HB 1070)
- ♦ School boards' policies limiting nepotism (Okla. HB 1647)
- ♦ Concurrent enrollment policies regarding transcript credit (Okla. SB 290)
- ♦ Policies specifying the notification date for teacher nonrenewal (Okla. SB 394)
- ♦ Policies specifying the circumstances in which school boards may issue standards of distinction to students (Okla. SB 222)

In addition, the Oklahoma State Department of Education is in the process of revising the Policies and Procedures for Special Education in Oklahoma and the Parents Rights in Special Education: Notice of Procedural Safeguards form. SDE's initial draft of the revised Policies and Procedures required school districts to adopt a policy regarding parent revocation of consent for special education services under the IDEA. However, the final revised Policies and Procedures may or may not include the policy requirement.

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Chalkboard is designed to provide current and accurate information regarding current education law issues. *Chalkboard* is not intended to provide legal or other professional advice to its readers. If legal advice or assistance is required, the services of a competent attorney familiar with education law issues should be sought.

We welcome your comments, criticisms and suggestions. Correspondence should be directed to Rosenstein, Fist & Ringold, 525 South Main, Seventh Floor, Tulsa, Oklahoma 74103-4508, or call us at (918) 585-9211 or 1-800-767-5291. Our FAX number is (918) 583-5617. Help us make *Chalkboard* an asset to you.