

Leave of Absence Considerations in Benefits and Employment Law

January 16, 2025

WHAT IS FMLA

- The Family and Medical Leave Act of 1993 (FMLA) generally requires covered employers to permit eligible employees to take unpaid, job-protected leave under the following circumstances:
 - Up to 12 workweeks of leave in any 12-month period for the birth of a child or the placement of a child for adoption or foster care, to care for an immediate family member who has a serious health condition, or because of their own serious health condition
 - Up to 12 workweeks of leave in any 12-month period for a “qualifying exigency” arising because a spouse, son, daughter, or parent is on active duty or call to covered active-duty status in a foreign country in the Armed Forces
 - Up to 26 workweeks of leave in a single 12-month period for an eligible employee to care for the covered servicemember with a serious injury or illness if the eligible employee is the spouse, son, daughter, parent, or next of kin of the covered servicemember

WHO MUST COMPLY

- The FMLA applies to:
 - Private-sector employers with 50 or more employees for each working day in 20 or more workweeks in the current or preceding calendar year
 - Separate businesses under common management or control are considered part of one single employer for purposes of the 50-employee threshold if they are an “integrated employer” as defined by the FMLA regulations
 - All public agencies (federal, state, and local governments) and local educational agencies (including public school boards, and public as well as private elementary and secondary schools) regardless of the number of employees

BENEFIT PLANS SUBJECT TO FMLA

- A “group health plan” is defined, for purposes of the FMLA, as the following:
 - a plan of, or contributed to by, an employer or employee organization to provide health care (directly or otherwise) to the employees, former employees, the employer, others associated or formerly associated with the employer in a business relationship, or their families
- The term “health care” is not defined. However, the requirement to maintain coverage under a group health plan during FMLA leave extends to any employer-sponsored plan that provides “medical care, surgical care, hospital care, dental care, eye care, mental health counseling, substance abuse treatment, etc.

BENEFIT PLANS SUBJECT TO FMLA

- Group health plans include (among others): medical plans, dental plans, vision plans, and health FSAs.
- The definition of group health plan does not include group term life insurance, AD&D, LTD, STD or DCAPs
 - An employee's entitlement to benefits during leave under a plan that is not a group health plan is determined by the terms of the plan and the employer's established policy for providing such benefits to employees on leave

EMPLOYEES ENTITLED TO FMLA

- To be entitled to leave under the FMLA, an employee must have worked for a covered employer for a total of at least 12 months (not necessarily consecutively) and must have worked at least 1,250 hours during the 12 months preceding the start of the leave
- Leave must be taken for one of the events specified under the statute

MAINTENANCE OF GROUP HEALTH PLAN BENEFITS DURING FMLA

- An employer must maintain coverage under any group health plan for the duration of FMLA leave at the level and under the conditions that coverage would have been provided if the employee had been continuously employed for the duration of FMLA leave
- If an employer provides a new health plan or changes health benefits or plans (including changes in coverage, premiums, or deductibles) while an employee is on FMLA leave, then the employee is entitled to and any changes apply to same extent as if the employee were not on leave

MAINTENANCE OF GROUP HEALTH PLAN BENEFITS DURING FMLA

- The obligation to maintain coverage ends when:
 - The employee chooses to drop coverage during leave
 - The employee fails to pay the employee share of the premium for coverage by the applicable deadline (including the required grace period)
 - the employee doesn't return to work at the end of the leave or informs the employer that he or she does not intend to return from the leave

PAYING FOR COVERAGE DURING FMLA

- For unpaid FMLA leave, employers may require employees to pay their share of premiums in any of the following ways:
 - Pre-pay (cannot be mandated)
 - Pay as you go
 - At the same time that premiums would be paid if by payroll deduction or on the same schedule that premiums would be paid under COBRA
 - Catch-up
- Employer must provide the employee with advance written notice of the conditions under which the payments must be made.

INTERACTION OF FMLA AND ADA

- Most employers that are subject to the FMLA will also be subject to the ADA
- In some situations, the employer might be required to grant unpaid leave under the ADA as a form of reasonable accommodation
 - ADA leave may be required even though the employee is not entitled to FMLA
 - ADA leave may run concurrent with FMLA leave
 - ADA leave be required after FMLA leave is exhausted

RESTORATION OF BENEFITS UPON RETURN FROM FMLA

- When an employee returns from FMLA leave, the employee must, with limited exceptions, be restored to an “equivalent position” with “equivalent benefits, pay, and other terms and conditions of employment.”
- To satisfy the requirement that benefits be “equivalent”, benefits must generally be “resumed in the same manner and at the same levels provided when the leave began, subject to any changes in benefits affecting the entire workforce that might have taken place while the employee was absent on FMLA leave.

COBRA AND FMLA

- The IRS COBRA regulations provide special rules for COBRA and leaves of absence under the FMLA
- Taking FMLA leave is not a COBRA qualifying event; however, the failure to return to work from FMLA leave is a qualifying event if
 - The employee was covered under the group health plan on the day before the first day of FMLA leave,
 - The employee does not return to work at the end of FMLA leave, and
 - The employee would, absent COBRA coverage, lose coverage under the group health plan before the end of the maximum coverage period
- COBRA maximum coverage period generally begins on the last day of FMLA leave (i.e. that date of the qualifying event).

COMMON ADMINISTRATION ISSUES

- Failing to provide notices re premium payments while on FMLA or termination of coverage for nonpayment
- COBRA administration
- Interaction between FMLA and ADA

Questions?