

SMART BUSINESS[®]

INSIGHT

DALLAS

Winds OF change

T. BOONE PICKENS
TALKS SUSTAINABILITY
AND HOW EVERY
BUSINESS CAN MAKE
A DIFFERENCE

SMART LEADERS

How David Ricker stays
connected with employees
by making himself
visible at Broadlane

FAST LANE

How Trisha Wilson
promotes community
service to her employees
at Wilson Associates

SPECIAL REPORT
SUSTAINABILITY

FMLA overhauled

How to understand changes to the Family and Medical Leave Act **Interviewed by Troy Sympson**

The Family and Medical Leave Act (FMLA) was amended in 2008, with new regulations taking effect on January 16, 2009. Congress amended the FMLA via the National Defense Authorization Act (NDAA) to create two new types of job-protected leave for eligible employees of covered employers.

The NDAA added “caregiver leave,” effective January 28, 2008, which allows employees to care for family members injured while on active duty in the U.S. military. On January 16, 2009, “exigent circumstances leave” took effect, which allows family members to provide assistance to U.S. military personnel under other urgent circumstances, unrelated to an injury.

Also, the Wage and Hour Division of the Department of Labor (DOL) had been developing revised FMLA regulations for years, in response to court decisions and feedback from employers. Rather than roll out two sets of new regulations, DOL addressed all of these changes in a single, new regulation.

“Now more than ever, employers must understand the FMLA, inside and out,” says Audrey E. Mross, a shareholder at Munck Carter, LLP.

Smart Business spoke with Mross about the FMLA changes and how employers can stay on top of them.

Did the definitions of ‘covered employer’ and ‘eligible employee’ remain the same?

Yes and no. The FMLA still applies to employers with 50 or more employees in the U.S., despite repeated attempts to lower that threshold to 25 employees. If your company is close to 50 employees, if you’ve merged with another entity or if you rely heavily on temporary help, it’s best to talk to a FMLA specialist to determine if you are a covered employer. As for eligible employees, the rules remain the same when applied to either family leave (time off for birth, adoption or foster placement of child with the employee) or medical leave (serious health condition of the employee or the employee’s spouse, parent or child), but they are different for the two types of leave added by the NDAA. Employees eligible to take caregiver leave



Audrey Mross
Shareholder
Munck Carter, LLP

are the injured service member’s spouse, parent, child or relative who is ‘next of kin.’ In the case of exigent circumstances leave, it is the service member’s spouse, parent or child who can take leave; however, this type of leave does not apply to service members who are in the regular armed forces. It’s limited to those who are in the National Guard or the Reserves.

Did the amount of FMLA leave change?

Again, yes and no. Eligible employees can still take family or medical leave for up to 12 weeks in a 12-month period (the 12-month period should be predetermined by the employer). Caregiver leave is up to 26 weeks in a single 12-month period, so that 12-month period will not necessarily coincide with the one designated by the employer for family and medical leave usage. Exigent circumstances leave is limited to 12 weeks and can be tied to the same 12-month period an employer designates for family and medical leave usage. The amounts of leave under the old FMLA and the new NDAA are coextensive so, for example, an employee who takes leave for a newborn and another leave for exigent

circumstances is capped at 12 weeks, rather than being able to take 24 weeks. An employee who takes leave for her own serious health condition and another leave for caregiver leave is capped at 26 weeks, rather than being able to take 38 weeks.

What other changes require an employer’s immediate attention?

If you have an employee who goes on leave for a qualifying reason but has not worked for you for at least 12 months when the leave commenced, you can now designate the leave as FMLA (going forward only) as of the 12-month mark. The 12 months of employment does not need to be consecutive, so you can count prior time worked in a rehire situation, but you don’t have to count employment that occurred before a break in service that lasted seven years or longer.

The employer may charge an employee with more FMLA time than is actually needed, when the nature of the job means the employee cannot arrive to work late. For example, if an employee needs only four hours for a doctor’s appointment, but she’s a flight attendant and the appointment causes her to miss a scheduled departure, she can be charged with FMLA for the entire shift missed and not just the four hours needed for the appointment.

Employers now can deny or prorate perfect attendance and/or production bonuses based on absence and/or lowered production caused by a leave taken through FMLA, so long as similar leaves of absence are treated in the same manner.

Also, FMLA claims can be settled or released without DOL or court approval, so long as they are not prospective in nature. And, employers now have five days (up from two) to designate a leave as FMLA-qualifying. <<

AUDREY MROSS is a shareholder at Munck Carter, LLP, leading the labor and employment group. Reach her at (972) 628-3661 or amross@munckcarter.com.