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EMPLOYMENT LAW UPDATE

SPRING 2008

IN THIS ISSUE

Changes to the FMLA, and More on the Way

by Jennifer L. Jordan; jordanj@millerjohnson.com; 616.831.1778

STATUTORY CHANGES

The Family and Medical Leave Act of 1993 was recently amended for the first time in 15 years. Employees now may be entitled to up to *26 weeks* of unpaid leave to care for an injured family member, according to the National Defense Authorization Act (NDAA), which President Bush signed into law in January. For purposes of the NDAA, an employee may now be eligible to care for an injured spouse, parent, son, daughter, or "next of kin," a new term defined as "the nearest blood relative of that individual," provided that the injured individual is a "covered servicemember."

A "covered servicemember" must have a serious injury or illness that (1) was incurred in the line of duty while on active duty and (2) may render the servicemember medically unfit to perform the duties of the servicemember's office, grade, rank, or rating. In addition, the injured servicemember must be a member of the Armed Forces, including the National Guard or Reserves. The servicemember must either be undergoing medical treatment, recuperation or therapy, be in outpatient status, or otherwise be on the temporary disability retired list. The Act does *not* require that the servicemember have been engaged with enemy combatants, so this expansion of the FMLA applies to servicemembers wherever they may be serving, even in the United States. This portion of the NDAA became effective at the time the law was signed, on January 28, 2008.

Be aware that the FMLA has not been amended to allow employees leave to care for "next of kin" under any circumstances other than those described above. Nor has it been amended to allow 26 weeks of leave under any other circumstances, so all other forms of FMLA leave remain limited to 12 weeks. Further, an employee may not take more than a *combined total* of 26 weeks of FMLA leave (of any kind) during a 12 month period, and spouses employed by the same employer may not take more than 26 weeks of leave combined.

Jennifer L. Jordan

In addition, employees will also be eligible to use their 12 weeks of FMLA leave when a family member is deployed in support of a contingency operation, provided that a "qualifying exigency" exists. The Department of Labor has been directed to issue regulations defining a "qualifying exigency," and it claims to be "working quickly" to draft such regulations. However, the process will necessarily take several months, and the absence of a current definition has resulted in some confusion as to when this provision of the NDAA is to take effect. The Department of Labor has taken the position that until it defines "qualifying exigency," the provision won't take effect. However, it has also stated that it will require employers to act in "good faith" in evaluating requests for this kind of leave until it does. So while the DOL will likely give you some breathing room with respect to this leave, you should be thoughtful about how you process any interim

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A New Era for I-9 Compliance

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I-9 AUDITS A TOP PRIORITY

I-9 audits are a top priority for U.S. Immigration and Customs Enforcement (ICE). At a recent conference, the Chief Counsel for the Department of Homeland Security, reiterated that no employer, regardless of industry or location, is immune. ICE recently increased its workforce to strengthen the administrative audit process, which identifies employers who knowingly hire undocumented workers, and to ensure proper preparation and maintenance of I-9 records. Improper documentation or maintenance can lead to further investigation and significant fines and penalties, which have been issued against corporate officers, human resource representatives, supervisors, and contractors. In 2007, ICE dramatically increased penalties against employers, securing fines and judgments of more than $30 million and making 863 criminal arrests and 4,077 administrative arrests.

NEW I-9 FORM

The U.S. Citizenship and Immigration Services (USCIS) revised Form I-9 to assist with enforcement efforts. Since December, employers have been required to use the revised I-9 Form for all new hires and when re-verifying expiring employment authorization documents. Employers who fail to do so will be subject to fines and penalties. The new form is available on-line for no charge at *www.uscis.gov.* The primary revisions include removal of the following items from the Acceptable Documents List:

- Certificate of U.S. Citizenship (Form N-560 or N-561)
- Certificate of Naturalization (Form N-550 or N-570)
- Alien Registration Receipt Card (I-151)
- Unexpired Reentry Permit (Form I-327)
- Unexpired Refugee Travel Document (Form I-571)

ENTICING GOVERNMENT COMPLIANCE PROGRAMS? NOT REALLY, BUT THERE ARE OTHER OPTIONS.

In another step toward heightened enforcement, the USCIS has offered to partner with employers to identify undocumented workers. The E-verify Program allows employers to electronically verify the employment eligibility of newly hired employees. It's important to note that participation requires employers to:

- Sign a Memorandum of Understanding with the government agreeing to post E-verify notices;
- Provide the Social Security Administration (SSA) and the Department of Homeland Security (DHS) with employer information;
- Follow specific procedures upon receipt of non-confirmation from E-verify;
- Allow the SSA and DHS to make periodic visits to the employer to review "E-verify-related records;" and
- Allow government representatives to interview its employees.

Congress is considering legislation (HB 5570) that requires employers who wish to be eligible to perform certain public contracts to participate in the E-verify system. And some states, including Georgia, Colorado, Oklahoma, and Arizona, have already enacted legislation that mandates employers' use of E-verify. Expect to see more states propose similar legislation.

The USCIS is also encouraging employers to voluntarily participate in the ICE Mutual Agreement Between Government and Employers program (IMAGE). The government will provide education and training on proper hiring procedures, fraudulent document detection, use of the E-verify program, and anti-discrimination procedures. In turn, employers must agree to submit to an I-9 audit by ICE, ensure the accuracy of their wage reporting, and verify the Social Security numbers of their existing labor force by using the Social Security Number Verification System.

Obviously, participating in these programs presents some risks for employers, and so we continue to recommend pursuing similar compliance objectives through the following steps:

- Implement an internal training program with annual updates to educate employees on how to manage completion of Form I-9 and how to detect fraudulent use of documents in the I-9 process.
- Designate only trained staff to complete the I-9 for new hires and required re-verification; include a secondary review process to prevent a single employee's errors from tainting your records.
- Conduct annual I-9 audits.

- Maintain I-9 forms separate from personnel files.
- Coordinate with legal counsel on responding to no-match letters received from the Social Security Administration.
- Establish and maintain safeguards to prevent the I-9 verification process from leading to claims of unlawful discrimination.

Miller Johnson will present "I-9 Compliance – Don't Let the Issues Put You at Risk," on Tuesday, April 29th. You can register through The Employers Association (TEA) by going to www.teagr.org click on *Educational Services* then *Seminars.*

For more information on any of these issues contact a member of our Immigration Law Practice Group: John F. Koryto, Michael E. Stroster, Daniel P. Perk, or Connie Marean.

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requests for this sort of leave and seek the assistance of counsel.

Aside from a "qualifying exigency," in order for leave to be available, the family member must also be in the Armed Forces in support of a military operation that results in a call or order to duty during a war or national disaster declared by the President or Congress. It is not clear that the Act requires the family member have a serious health condition. The answer to that question will depend on how the DOL defines the term "qualifying exigency." However, the revised language in the Act seems to imply that it would not be necessary for any individual to have any sort of health condition for "active duty" leave to be available.

It is also worthy of note that the FMLA definitions of "son" and "daughter" have *not* changed. As a result, otherwise competent uninjured offspring will not meet the definition once they turn 18. Unless Congress changes those definitions for purposes of the NDAA, parents of adult children deploying into the service typically will *not* be eligible for such leave.

PROPOSED REGULATORY CHANGES

Regulatory changes are also on the horizon. On February 11, the Department of Labor published over 500 pages of proposed revisions to its regulations under FMLA. The DOL is seeking comment on the proposed modifications, and the comment period was open until April 11. Most commentators believe that the DOL will work aggressively to ensure that these regulations go into effect before the sand in the Bush administration hourglass runs out.

Until the comment period closes, these proposals remain subject to change (and that change could be significant). However, what the DOL has proposed is quite favorable for employers. Some brief highlights:

- The definition of "serious health condition" would be modified to require that the two or more treatments must occur within a 30 day calendar period, and for chronic conditions, the employee would have to see a physician for the condition at least twice a year;
- There are numerous changes to the medical certification provisions, that would allow you to obtain more information from health care providers, and under some circumstances you could seek that information directly *from* the health care provider;
- Employees on FMLA leave would no longer be entitled to receive a "perfect attendance" or similar bonus as long as all types of leave are treated the same;
- You would get five days rather than the current two to provide an employee notice of eligibility for FMLA leave and designate a leave as FMLA leave;
- Employees would be required to provide more information as part of a notice of need for FMLA leave, including the anticipated duration of the leave and whether the employee (or family member) is being treated by a health care provider;
- Employers and employees would be permitted to settle accrued FMLA claims without the approval of the DOL or a court;
- You would be entitled to a certification of fitness to return to duty for absences taken on an intermittent or reduced schedule leave if there are reasonable safety concerns about the employee's ability to perform his or her duties based on the serious health condition.

We will keep you informed as these proposed regulations make their way through the administrative approval process. Remember, they could be changed dramatically before they ultimately become effective. In the meantime, questions or concerns about these regulations, the NDAA amendments, or other FMLA issues may be directed to the author or your regular Miller Johnson attorney.

Healthcare
UPDATE

Do You Have to Let the Unions Use Your Email System? Healthcare Organizations Get Some Leeway

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Healthcare organizations have reason for optimism. Recent guidance from the NLRB will help fashion rules that better balance an employer's right to allow access to its property, including email access, without necessarily opening the door to unions. For some time, the NLRB has permitted healthcare facilities, unlike other industries, to allow third-party solicitations and distributions that are "an integral part of the employee's healthcare functions and responsibilities" without requiring similar access for unions. Based on that general standard, the Board has permitted healthcare organizations to allow activities like blood drives, medical books displays and sales organized by vendors, and promotions of Girl Scout projects for the hospital's benefit, to be held on their property, without providing such access to unions.

THE EMAIL QUESTION

But an open question remained. What rights did employees have to use the employer's email system to solicit support for unions? Unions had taken the position that if an employer allowed any non-business use for its email system, it also had to allow employees to use the system to transmit information about unions. On December 24, in a case of first impression, the Board decided *Guard Publishing Company.* That case did two important things:

First, it confirmed that employees have no statutory right to access or use an employer's email system for union-related activities. This ruling is consistent with prior NLRB decisions concerning the use of other employer equipment and property like bulletin boards and copy machines.

Second, the decision recognized that employers may open up their communication systems (and, by logical extension, other employer-owned property or equipment) for certain non-business related purposes without necessarily giving up their right to prohibit access or use by union organizers under the Board's prior rule.

The second ruling marks an important departure from prior law. Under previous NLRB cases, an employer who allowed non-work-related uses of its property like bulletin boards, email systems, or telephones could not lawfully prohibit union supporters from using the same things to organize employees. So an employer who allowed non-work-related solicitation of its employees or use of its property risked opening up its systems and property to union supporters. Under the Board's new approach, however, an employer may lawfully draw distinctions between acceptable and non-acceptable access to its premises and use of its equipment, as long as the distinctions are not based on an employee's protected activity (i.e., his/her support of a union) under the NLRA. The Board listed the following examples of distinctions an employer may draw without unlawfully discriminating against protected activity:

- Charitable solicitations vs. non-charitable solicitations
- Solicitations of a personal nature (for example, a car for sale) vs. commercial solicitations
- Personal invitations (for example, parties or baby showers) vs. invitations for an organization
- Informational communications vs. solicitations
- Business-related uses vs. non-business-related uses

These new distinctions may prove especially helpful for healthcare employers, whose work naturally involves interaction with third-party charitable organizations. For example, an employer may now permit solicitation of its employees by sponsoring a United Way drive, supporting Red Cross emergency financial drives for disasters like Hurricane Katrina, or allowing access by similar charitable organizations, while still lawfully prohibiting solicitations on behalf of a union.

SOLICITING OR INFORMING?

A few words of caution are in order. Remember that unions will be permitted to use employer-owned equipment and property the same way other non-employee users are. Also, if you allow employees to use email or other communications systems to exchange information that is not directly related to the business of your healthcare organization, you will open those systems up to pro-union employees' personal or informational use. Once that door is open, an employee who supports a union can likely provide information about the union on your email system up to the point where it becomes solicitation. Unfortunately, it will not always be easy to determine whether a communication is "soliciting" support for the union or simply "informing" co-workers on personal matters. These issues may prove even trickier if your workforce is already unionized.

BE READY

Dust off your solicitation and electronic communications policies in light of the *Guard Publishing* decision. Making sure those policies reflect the current status of the law as well as your organization's current practice will best position you to avoid unfair labor practice charges that could result in your organization being required to allow employees to use your email system to solicit support for or provide information about unions.

If you have any questions about this ruling or how it applies to your policies, please contact the authors or a member of Miller Johnson's Employment – Health Care practice group.

New FMLA Solutions Programs Boost Productivity and Cut Costs

A recent study found the annual cost of the FMLA to U.S. employers exceeds $21 billion due to lost productivity, replacement labor and healthcare benefits.

Miller Johnson's FMLA Solutions practice group understands the FMLA's costs and challenges. As part of its creative, hands-on approach, Miller Johnson offers two special programs to help employers reduce costs, boost productivity and provide employees with a fair and balanced work environment.

Solution Step 1: Reinforcing the Foundation is designed to improve an organization's current FMLA program at a flat fee. It includes revising the FMLA policy, reviewing and customizing Notice and Medical Certification Forms, and conducting on-site training with the human resources staff and supervisors.

Solution Step 2: Managing Intermittent Leave is a year-long program designed specifically for employers challenged by intermittent leave. It includes a monthly access retainer which empowers an organization to partner with Miller Johnson's FMLA experts without the typical hourly fee. Cost-savings goals are set at the beginning of the year. At the end of the year, we provide a progress report that evaluates how our proactive FMLA tools have resulted in actual cost savings for the organization.

For a brochure with more details on these programs or any questions, please contact Sarah K. Willey, FMLA Solutions Practice Group chair, at willeys@millerjohnson.com

EMPLOYER CAN BE LIABLE FOR CO-WORKER RETALIATION.

Can an employer be held responsible for not only its own illegal retaliation against an employee, but also for retaliation of co-workers? This issue had not been previously addressed by the Sixth Circuit Court of Appeals. In a new ruling, the court held that an employer will be liable to an employee for a co-worker's actions if (1) the co-worker's retaliatory conduct is sufficiently severe to dissuade a reasonable worker from making or supporting a discrimination charge, (2) supervisors or members of management have actual or constructive knowledge of the co-worker's retaliatory behavior, and (3) supervisors or members have condoned, encouraged, or tolerated the acts or retaliation, or have responded to the plaintiff's complaints so inadequately the response manifests indifference or unreasonableness under the circumstances.

RETALIATION CLAIMS CONTINUE.

In two recent cases, the Sixth Circuit Court of Appeals addressed the increasingly common claim of illegal retaliation. In one, an employee convinced a jury that his termination was in retaliation for making complaints about age and national-origin discrimination, not because of his alleged poor performance. Even though the jury rejected his claims of illegal discrimination, its verdict on retaliation was allowed to stand. This shows that it is not enough for an employer to avoid illegal discrimination and to investigate claims of illegal discrimination; it must also be careful to avoid the appearance of getting back at the employee for making these types of claims. In the second case, the court addressed whether the timing of the employer adverse action alone was enough to let a jury decide whether its actions were retaliatory. In that case, the employer terminated the employee on the same day it learned that the employee had just filed an EEOC charge. This extremely close temporal proximity was enough to propel the case forward. Employers take note: retaliation cases are on the rise and are possible even when there has been no discrimination in the first place.

COURTS CONTINUE TO LOWER THRESHOLD FOR WHAT CONSTITUTES EMPLOYEE NOTICE OF NEED FOR FMLA LEAVE.

A recent Seventh Circuit Court of Appeals decision has held that conduct by an employee may put an employer on notice of a need for FMLA even though the employee herself does not know that she has a serious health condition qualifying her for FMLA leave, and has not asked for it. In the case in question, a stray dog climbed through a window of an electrical contractor's warehouse and approached the reception area. The receptionist underwent an extreme emotional and physical reaction to the presence of the dog, and began swearing and cursing at her supervisor, screaming that "#*%&@ animals shouldn't be in the workplace!" Two hours later, she told her supervisor that she was ill and needed to go home. The next day, the receptionist stormed into the office of the president of the company, complaining that it was wrong for her to be subjected to "@#*%&* dogs" running by her desk and "threatening her." Despite the president's efforts to calm her down, the receptionist continued to scream for a good eight to ten minutes. She then left the warehouse, called in sick for several more days, and was ultimately terminated because of her behavior. The receptionist was ultimately diagnosed with anxiety and stress, and she sued the company for alleged interference with her FMLA rights. The Seventh Circuit held that even though the receptionist failed to give her employer timely notice of a need for FMLA leave, she might be excused by the provision in the regulations waiving that requirement where "notice is not feasible." Since the receptionist was unaware that she was suffering "anxiety and stress," she could not provide the company with notice. However, the court found that a jury could find that her extreme and unusual behavior, when she had an otherwise unblemished disciplinary record, constituted constructive notice to the employer of a serious health condition.

MIOSHA TO CONSIDER AN ERGONOMICS STANDARD. In a controversial move, MIOSHA is moving forward with a standard requiring employers to have an ergonomics program. A MIOSHA-sponsored advisory committee had been working on this for the past few years, with management representatives in dissent on the need for a mandatory rule. MIOSHA is now set to use its formal rule-making process to make the proposed standard an obligation for Michigan employers. If passed, it would require all employers in general industry (including both private sector employers and state and local governments) to provide all employees with "ergonomic awareness training" and create a process for "assessing and responding to ergonomic occupational risk factors." Employer groups are mobilizing to prevent such a mandatory rule, but MIOSHA appears ready to go forward this spring.

USDOL BUSY COLLECTING BACK PAY IN FISCAL YEAR 2007. More and more, employers are faced with government audits. The U.S. Department of Labor has several divisions that audit for compliance with a variety of federal laws, including the Wage and Hour Division enforcing laws on minimum wage, overtime pay, family and medical leave, and the like, and the OFCCP, enforcing employment requirements for federal contractors. Shortly after fiscal year 2007 ended, the USDOL announced record increases in the dollar amount of settlements in claims against employers. Expect this type of enforcement to continue; you should regularly audit your policies and practices to determine compliance with these requirements. Miller Johnson's employment section is prepared to assist with these audits.

MILLER JOHNSON IN THE NEWS

MARY V. BAUMAN and **GARY A. CHAMBERLIN** spoke at the Southwest Michigan School Business Officials conference on March 6.

DAVID M. BUDAY was appointed to the Kalamazoo County Family YMCA Board of Directors. He will speak on "Healthcare Employment Issues" at Hospital Network, Inc.'s Annual Retreat on May 22. He also presented "A Just and Fair Workplace Environment" at Saint Thomas Health Services Leadership Retreat, in Nashville, TN, on Feb. 20.

DAVID M. BUDAY and **SARAH K. WILLEY** will be speaking on "Managing FMLA Intermittent Leaves" at the Michigan Healthcare Human Resources Conference on April 24.

MARCUS W. CAMPBELL, CONNIE L. MAREAN, JOSHUA D. MEEUWSE, JEFFREY C. MELVILLE, **GREGORY P. RIPPLE, MICHAEL E. STROSTER** and **SARAH K. WILLEY** are presenting an Employment Law Update on June 11 sponsored by Sterling Education Services, Inc.

KEITH E. EASTLAND did a webinar on Jan. 31 on recent employment changes in state and federal law for The Employer's Association.

WILLIAM H. FALLON was appointed to the State Bar of Michigan Standing Committee on Character & Fitness.

JENNIFER L. JORDAN participated in Cooley Law School's program "Presumed Equal: A Variety of Perspectives from Women in the Legal Profession." The March 21 program was taped by Grand Rapids Community College and can be viewed on their website (www.grcc.edu/channel28).

PETER J. KOK, JAMES C. BRUINSMA, JENNIFER L. JORDAN and **NATHAN D. PLANTINGA** did an Employment Law Update for The Employer's Association Human Resource Group on Feb. 21.

GREGORY P. RIPPLE'S article "New Age 60 Legislation: Does it Affect My Part 91 or 135 Operations?" was published by the National Business Aviation Association (NBAA). He also presented at the NBAA conference in Fort Lauderdale, FL in Feb.

CATHERINE A. TRACEY joined the Indian Trails Camp Board of Directors.

SARAH K. WILLEY presented "FMLA Expanded for Military Families" on April 9 at the Prince Center for Association for Human Resource Management (AHRM).

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