

For 2009, the Only Sure Thing is Change – And More Change

By Wendy Smith (Tampa)

Before most of us even had time to put up our 2009 calendars, huge changes in employment laws were on the way, courtesy of Congress and the new administration. By the end of January, major amendments to the Americans With Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA) went into effect. The following month, the economic stimulus package, formally known as the American Recovery and Reinvestment Act of 2009 (ARRA), was signed into law. Among other things, ARRA substantially changed employers' COBRA obligations, allowing eligible involuntarily terminated employees to pass on 65 percent of the cost of COBRA premium payments to their employers.

Other legislation has already been introduced in Congress this year that would continue to dramatically change employers' responsibilities under employment laws. Several, such as the Employee Free Choice Act (EFCA), stand a good chance of passing. Given the recent flood of changes and the strong possibility that more are ahead, we urge schools to take action immediately to comply with applicable revisions to the ADA, FMLA and COBRA, and keep an ear to the ground for what is ahead.

The ADA And The Meaning Of “Disabled”

In perhaps the most sweeping change in employment law in over 10 years, the recent passage of the “ADA Amendments Act” will mean major changes in employment practices for many schools throughout the country. The new provisions, which became effective January 1, 2009, will not only have a tremendous impact on employers' ability to successfully defend against disability discrimination claims, they will require most schools to adopt new policies and procedures for dealing with accommodation requests.

The first – and perhaps most significant – change is that the new ADA mandates that courts (and employers) must adopt a broad standard when determining whether an individual is considered disabled. In the past, employees have had an uphill battle to prove the existence of a disability within the narrow meaning of “disabled” ascribed to by the majority of courts. The new ADA obliterates years of courts' rulings interpreting “disability,” including several U.S. Supreme Court decisions. The new law's stated intent is to provide “a broad scope of protection” for employees, and that courts examining ADA cases need to provide coverage for plaintiffs “to the maximum extent permitted” by the statute.

Employers who are faced with making employment decisions involving individuals who might have a disability must now consider that the employee is significantly more likely to be considered disabled under the new, broadened scope of coverage. Because of that, we anticipate that the focus of the ADA in the workplace (and disability discrimination litigation) will shift to the accommodation process. Schools should err on the side of caution when determining whether to engage in the interactive process with an employee, and will need to more thoughtfully react to requests for accommodation. When it comes to day-to-day employee relations, schools need to immediately adapt interactive processes and



policies and be prepared to offer accommodations to a wider percentage of their workforces.

Additionally, the changes to the ADA make it a virtual necessity for schools to ensure that their job descriptions are accurate and realistic. Out-of-date or inaccurate job descriptions will be a bigger problem than ever in the event a school is sued for disability discrimination. When revising job descriptions, however, be aware that one important aspect of the ADA did not change. Employers are not required to delegate away or eliminate essential job functions to accommodate an employee with a disability, although they may be required to do so with respect to nonessential functions. So, to the extent a school's job descriptions distinguish between essential and nonessential functions, such distinctions should be drawn as accurately as possible to afford the best defense possible in the event of litigation over accommodation issues.

FMLA – Some Pluses And Some Minuses

Changes to the FMLA became effective on January 16, 2009. The new regulations involve a large number of significant changes, including the need for covered employers to incorporate new forms to comply with military service-related leaves and changes to medical certification and designation forms. Among other new requirements, the regulations also include revised timeframes for employers to give notice to employees that leave requests are or are not FMLA-qualifying.

While some employers felt the changes did not go far enough to help curtail FMLA abuse, employers did gain some ground. For example, the new regulations allow employers to make more detailed inquiries of an employee's health care provider as a condition of the employee's return to work if the employee took leave for his or her own serious health condition.

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A Refresher Course On FMLA Leaves

By Suzanne Bogdan and Colette Wolf (Fort Lauderdale)

Pop Quiz!

A teacher approaches you at the beginning of the school year and tells you that she is pregnant and will be needing time off in early April for the birth of her baby. She plans to return for the last two weeks of the term. Another employee, your football coach, approaches you and states that his father, an Army Sergeant Major, suffered a serious injury while in Iraq and he needs one day off each week for the next eight weeks to assist in his father's planned medical treatment. What are the school's obligations in these situations?

Before answering these questions, let's review some requirements, old and new, of the Family Medical Leave Act (FMLA).

Basic Coverage and Eligibility Requirements

Although schools (regardless of size) are required to comply with the notice and posting requirements of the FMLA, schools need only provide job-protected FMLA leave if the employee meets the Act's eligibility requirements. To be eligible, an employee must work at a worksite where at least 50 employees are employed within 75 miles; be employed for 12 months, which need not be consecutive (there can be as much as a 7-year gap); and have worked 1,250 hours in the 12 months preceding the start of the leave.

When calculating the 1,250 hours requirement, do not count only the hours that an exempt employee (i.e., teacher or administrator) is *scheduled* to work. Because these categories of employees often work many hours both before and after normal school hours, you need to ensure that those "extra" hours before/after work are counted when determining whether such person meets the 1,250 hours requirement. As a benchmark, a teacher working nine months of the year would meet the 1,250 hour benchmark if he or she worked approximately 35 hours a week.

Once the school determines that an employee is eligible to take leave, the school must determine whether the reason for the leave falls within the regulations. Although most administrators are familiar with the typical reasons that trigger FMLA leave, such as for the birth and care of a new-born child, care of an immediate family member, or care for one's self, there are some new provisions that have only recently been defined by the Department of Labor (DOL). Many of these new provisions are outlined in our Legal Alert issued November 18, 2008 ("New FMLA Regulations Leave Employers Scrambling to Comply"). This article will discuss the old provisions that are somewhat unique to schools and outline the specifics of some of the new regulations that were released on November 18, 2008.

Military Caregiver Leave

This is also known as Covered Servicemember Leave. Eligible employees who are family members of covered servicemembers are entitled to take up to 26 workweeks of leave in a "single 12-month period" to care for a covered servicemember with a serious illness or injury incurred while on active duty, and in the line of duty. The definition of

"family members" includes family members not otherwise covered by the FMLA, such as "next of kin," which means the nearest blood relative (including siblings, grandparents, aunts, uncles, and first cousins).

During the 12-month period, an eligible employee is entitled to a combined total of 26 workweeks of FMLA leave (counting *all* types of FMLA leave, including exigency leave described below). All other provisions of the FMLA apply, such as employee eligibility, appropriate notice, medical certifications, definitions, and so on. As with other types of leave, the employer has the right to require the employee to support a request for leave with an appropriate medical certification.

Although the DOL only recently issued regulations outlining the specifics of this leave, the law actually went into effect in January 2008.

Qualifying Exigency Leave

This provision makes the normal 12 workweeks of FMLA job-protected leave available to eligible employees with a covered military member serving in the National Guard or Reserves to use

for "any qualifying exigency" arising out of the fact that a covered military member is on active duty or called to active duty status in support of a contingency operation. "Qualifying exigency" means:

- short-notice deployment (leave to address any issue that arises from an impending call or order to active duty in support of a contingency operation seven days or less prior to the date of deployment);
- military events and related activities (leave to attend any military ceremony, program or event related to the active duty call or to attend family support or assistance programs and informational briefings);
- childcare and school activities (leave to arrange or provide for child care or school related activities);
- financial and legal arrangements (leave to make or update financial or legal arrangements);
- counseling (leave to attend counseling by someone other than a health care provider when necessary as a result of the active duty status);
- rest and recuperation (leave to spend time with a covered military member who is on short-term rest-and-recuperation leave (up to five days);
- post-deployment activities (leave to attend arrival ceremonies, funerals, memorial services, reintegration briefings, and other ceremonies or programs sponsored by the military up to 90 days following the end of active duty status); and



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Another “win” for employers is that they may now contact an employee’s health care provider *directly*, subject to some restrictions, for information about an employee’s serious health condition. We recommend that schools familiarize themselves with the changes now, especially in order to begin taking advantage of the changes that benefit employers.

More detailed information regarding FMLA is found in the companion article “A Refresher Course On FMLA Leaves,” in this issue.

COBRA: Retroactive Changes Necessary

The new law, which becomes effective with the first monthly period of COBRA coverage beginning on or after February 17, 2009 (for most plans, this means March 1, 2009) subjects employers and insurers to new administrative, notice and reporting requirements. The Act’s COBRA provisions apply to group health plans subject to federal COBRA as well as small employer plans exempt from COBRA but subject to state law coverage continuation rules.

The ARRA provides a 65% tax subsidy for the cost of health benefits for the unemployed, meaning that certain employees who elect COBRA coverage will be responsible for 35% of the premium payment, while the employer pays the other 65 per cent. To be eligible, an employee must have been involuntarily terminated between September 1, 2008 and December 31, 2009, and must be eligible for COBRA and timely elect coverage. Other COBRA-qualifying events, such as resignations or reductions in hours, do not allow employees to take advantage of the premium payment reduction.

The Employee “Free Choice” Act

Perhaps the number one discussion topic in labor law circles today is the Employee Free Choice Act, a bill currently being debated in Congress

that President Obama has already agreed to sign. If enacted, the EFCA would make it easier and faster for union organizers to unionize a workforce by virtually eliminating secret-ballot union elections. If passed, it would be the most significant legislative change to the National Labor Relations Act (NLRA) in decades. If the EFCA passes, more employers can expect to become targets for union organization activity and employers who do become targets will find it substantially more difficult to avoid unionization.

Whether the EFCA will open the door to unionization in private educational institutions is unlikely, but not impossible. Independent schools without religious ownership or affiliation are the most likely targets. This is because religious institutions are exempt from the NLRA. Thus, schools that are owned and controlled by the church or religious organization are exempt from coverage of the NLRA. The other target schools will be those that are affiliated with a religion or have a religiously-directed curriculum, but not necessarily owned, operated or controlled by a particular church or religious organization. But there have been cases where unions have argued successfully that an educational institution is affiliated with the church (rather than “church-controlled” with a primary objective of providing secular education) and therefore covered by the NLRA.

Even religiously-affiliated schools and organizations should oppose the passage of the EFCA. As a preventive measure, such entities should audit their educational institutional practices to determine whether they have a sound basis for taking the position that their primary objective is providing secular education. Religiously-affiliated schools should be prepared to position themselves to the fullest extent possible to claim exemption from the NLRA if the EFCA passes.

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- additional activities arising out of the covered military member’s active duty or call to active duty agreed to by the employer and employee (as to both timing and duration).

The new DOL regulations on this type of leave became effective on January 16, 2009.

Special Rules for Schools

Congress recognized that there could be a substantial disruption to the educational process from instructional employees taking leave at certain times during the academic year or for certain intervals. As result, there are special rules in the FMLA regulations regarding “instructional employees” of public and private elementary and secondary schools. “Instructional employees” are those whose principal function is to teach and instruct students in a class, small group or individual setting. Thus, “instructional employees” includes not only teachers in the school, but also athletic coaches, driving instructors, and special education assistants, such as signers for the hearing impaired. For “instructional employees,” the following rules apply:

- With regard to intermittent or reduced schedule leave (for an employee’s own serious health condition, to care for a covered

Service member, or to care for a sick family member with a serious health condition), if the medical leave is foreseeable based on planned medical treatment and the employee is scheduled to be off work *more than 20%* of the working days during the period of medical leave (for an instructional employee working 5 days a week, 20% would be one day), the school may require the employee to choose:

- to take leave of a particular duration not to exceed the duration of the planned leave (the entire period of leave is counted as FMLA leave); or
- to temporarily transfer to another position, so long as such position has equivalent pay and benefits and is a position for which they are qualified. The position also has to better accommodate the employee’s intermittent leave.

If leave is requested near the end of the term, the following rules apply regarding job restoration:

Leave within last three weeks of the end of the Academic Term for a purpose other than the instructional employee’s own serious health condition

School may require continuous leave until the end of the term if:

- Period of leave lasts more than five working days.

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Leave within last five weeks of the Academic Term for a purpose other than the instructional employee's own serious health condition

School may require continuous leave until the end of the term if:

- Period of leave is longer than two weeks; and
- Return to work would occur within two weeks of the end of the Academic Term.

Leave more than five weeks prior to the end of the Academic Term

School may require continuous leave until the end of the term if:

- Period of leave is at least three weeks;
- Return to work would occur during the last three weeks of the Academic Term.

In these cases, only the period of leave taken until the employee is ready to return to work may be charged against the instructional employee's twelve weeks (not the additional time the school requires the employee to not work).

What Time Off Counts as Leave?

Schools, like other employers, can only count leave time as FMLA leave when the employee would be otherwise working. For example, teachers typically are not required to work during the spring, summer, and winter breaks. Thus, if the employee took FMLA leave before one of these

breaks, the period of the break does not count as FMLA leave weeks for that employee. Example: Teacher takes FMLA commencing December 1. Winter break runs from December 19 to January 3. This period of December 19 through January 3 does not count as FMLA leave for the teacher.

Since clerical, maintenance, security, and some administrative employees are required to work some or all of the periods of summer, winter, and spring breaks, these weeks would be counted as FMLA leave for those employees. Weeks in which the school is open for a portion of the week, such as Thanksgiving week and President's Day week, would be counted toward FMLA leave for all employees.

Married Employees Who Work for the Same Employer

Another rule that often applies in the school setting applies when two eligible employees are married and work for the same employer. When the reason triggering the need for leave is for the birth or placement of a child for adoption or foster care, or to care for the employee's parent with a serious health condition, such leave can be limited to a combined total of 12 workweeks (provided, however, that a combined total of 26 weeks applies if caring for a covered Service member with a serious illness).

But this limitation does not apply, if leave is taken by either spouse to care for the other spouse, or leave taken to care for a child or the employee's own serious health condition.

Answers To The Quiz

Presuming that both employees in our scenarios set forth in the first paragraph meet the statutory requirements to be eligible to take FMLA leave, the teacher requesting leave for the birth of her baby can be required to take leave through the remainder of the term, once the leave begins. She is requesting leave that will begin more than five weeks prior to the end of the term, leave that will extend longer than three weeks, and her requested return to work date will occur during the last three weeks of the term. Once she is ready to return to work, however, all subsequent leave required by the school does not count against her 12-week entitlement.

The football coach is also an instructional employee. He has requested leave one day each week. The request should be granted. Had he requested more than one day off each week (i.e., more than 20% of his workweek), in addition to granting the leave request, the school could require the football coach to choose between temporarily transferring to a position of equal pay and benefits which better accommodates the reduced schedule, or to take leave of a "particular duration" (i.e., full time leave for the full eight week period).

Summary

This short summary highlights only a few areas of the FMLA that apply to schools. As this analysis demonstrates, the FMLA can be complex and requires a thoughtful approach to each individual situation. Different rules may apply depending on whether the employee is an instructional employee, the purpose of the leave, and the planned duration.

Regardless of the number of employees who work for a school, all schools are required to comply with the policy and posting requirements of the FMLA. Moreover, to ensure consistency in providing appropriate notice of leave, schools should both designate one particular person to be in charge of this process and have good forms and procedures to follow each time. Now is a good time to ensure compliance with those requirements. Our FMLA kit containing guidance and forms, can help.

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