Possible Relief for FMLA Administration Pain Points

It's no secret that employers have found administration of leave under the Family and Medical Leave Act (FMLA) to be a significant pain point. Relief, however, may be on the way.

In a spring regulatory agenda notice, the U.S. Department of Labor announced that it is considering making some changes to the FMLA. The Department has asked the public for feedback on how to:

"(a) better protect and suit the needs of workers; and (b) reduce the administrative and compliance burdens on employers."

Although DOL has released no specifics, many believe that the White House's labor policy adviser, James Sherk, will be the driving force behind any upcoming changes. Sherk's earlier outspokenness about the shortcomings of the FMLA leave provides good insight into his thoughts about what needs to change.

In his 2007 Heritage Foundation report, Sherk outlined his views on employee FMLA abuse. His report portends changes could be on the horizon that will:

- narrow the definition of what constitutes "a serious health condition;"
- provide more power to employers to investigate an employee's condition;
- allow employers to require workers to take leave in half-day, rather than smaller, increments; and
- allow employers to count FMLA leave against attendance bonus policies.

What changes could mean for employers

If Sherk really is the man behind the plan, employers may get the relief they seek.

First, limiting the definition of "a serious health condition" should make it more difficult for employees to abuse the FMLA. In his report, Sherk highlighted several instances where "irresponsible" employees were taking advantage of the current vague definition by calling routine colds, stress, or even an injured toe a "serious health condition"—even when the condition has no impact on the employee's ability to perform job duties. This would also help to lessen the burden on other employees who are required to pick up the slack when co-workers abuse FMLA leave.

Second, providing employers with more power to investigate employees' conditions would resolve the communication barrier between employers, employees, and health care providers when issues surrounding the complex and lengthy paperwork arise—satisfying the goal of reducing administrative burdens.

Third, allowing employers to require workers to take leave in half-day increments would decrease the heavy administrative burden of tracking an employee's leave in minute increments. Rather than tracking the 12-weeks of allowed FMLA leave a minute at a time, a more manageable tracking unit of half-day increments would make what once was a monumental task for employers more manageable.

Finally, allowing employers to count FMLA leave against attendance bonus policies would both help employees with favorable attendance not feel cheated when those with spotty attendance are nonetheless rewarded and incentivize employees not to abuse FMLA. The DOL has found that because an employer may not punish an employee for using FMLA, even workers who miss 50 days a year due to FMLA leave can still be eligible for a perfect attendance bonus, diluting the incentive these bonuses are intended to provide. Correcting this would allow employees with excellent attendance to reap due awards and hit

FMLA abusers where it hurts—their bank account.

Conclusion

While employers will have to wait for definite answers as to what changes, if any, we will see, the good news is that it appears that employer concerns about FMLA abuse are not falling on deaf ears. In the meantime, employers should continue to monitor the situation and hope that relief is on the way.

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