

Claremont Management Group Presents Hot HR Issues – COBRA & FMLA JULY 21, 2009

By

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1. Note that Federal Minimum Wage Increases to \$7.25/hr. on July 24, 2009.

2. COBRA – New Adjustments on Payment and Eligibility:

A. Current Basics:

1) Covered Employer:

Must have at least 20 Employees more than 50 percent of business days in the previous calendar year for Coverage.

Note – Additional Issue with Texas Continuation Coverage for 6 months.

2) Who is covered:

Terminated Employee currently in health plan*
Spouse or dependent child of Covered Employee
*Exception – “**Gross Misconduct**”

3) Trigger Events:

Termination from employment or sufficient reduction in hours
Divorce
Disability
Death of Covered Employee
Dependent loses parent’s coverage
Covered Employee enters Medicare – Spouse can continue COBRA

4) Benefits:

Right to continue coverage for 18 months
Disability – Additional 11 months with SS letter
Coverage for 36 months for divorced spouse
[Or, until covered by another group plan]

5) Requirements:

Must exercise right to COBRA timely#
Employee must pay premium on time.
Employer can add 2% handling fee to premium.

2. COBRA Continued:

Qualified beneficiaries must be given at least 60 days for the election. This period is measured from the later of the coverage loss date or the date the COBRA election notice is provided by the employer or plan administrator. The election notice must be provided in person or by first class mail within 14 days after the plan administrator receives notice that a qualifying event has occurred. Covered beneficiary has up to 45 days after filing election to pay initial premium.

B. American Recovery and Reinvestment Act of 2009:

Requires employers to maintain the following documentation:

- Dates and amounts of the assistance eligible individuals' 35% share of the premium.
- A copy of the invoice or other supporting statement from the insurance carrier (when you have an insured plan) and proof of timely payment of the full premium to the insurance carrier required under COBRA.
- Proof of the (1) premium amount and (2) coverage provided to the assistance eligible individuals. (Self-insured plans only.)
- Attestation of involuntary termination, including the date of the involuntary termination which must be between 9/1/08 and 12/31/09, for each covered employee whose involuntary termination is the basis for eligibility for the subsidy.
- Proof of each assistance eligible individual's eligibility for COBRA coverage at any time during the period between 9/1/08 and 12/31/09, and election of COBRA coverage.
- Social Security Numbers of all covered employees, the amount of the subsidy reimbursed with respect to each covered employee, and whether the subsidy was for one individual or two or more individuals.
- Other documents necessary to verify the correct amount of reimbursement. Note that although your company must maintain this documentation, you're not required to submit it with your Form 941.

Income limits: If an individual's modified adjusted gross income for the tax year in which the premium assistance is received exceeds \$145,000 (or \$290,000 for joint filers), then the amount of the premium reduction during the tax year must be repaid. For taxpayers with adjusted gross income between \$125,000 and \$145,000 (or \$250,000 and \$290,000 for joint filers), the amount of the premium reduction that must be repaid is reduced proportionately.

CAUTION: There's a chance your request for reimbursement on Form 941 of your COBRA subsidy could get bounced back by Feds. A new notice from the Internal Revenue Service, CP 269C, is being sent to certain employers explaining that examiners are "reviewing" the claim and temporarily freezing the reimbursement.

ACTION PLAN:

Notify Employees who did not elect COBRA, (or elected but dropped it during the covered period), and had an involuntary termination between September 1, 2008 and February 17, 2009. Past that date, give notice in real time. Needed to be notified by April 18, 2009 and has up to 60 days to apply for COBRA.

Cutoffs: 1) 9 months of subsidy, 2) No longer eligible for coverage due to COBRA period passes or 3) has other group health coverage eligibility.

3. FMLA – Additional Coverages and New Forms:

A. FMLA Basics:

1) Benefits:

Up to 12 weeks of unpaid, job-protected leave per year. It also requires that their group health benefits be maintained during the leave.

Any of the following reasons:

- for the birth and care of the newborn child of an employee;
- for placement with the employee of a child for adoption or foster care;
- to care for an immediate family member (spouse, child, or parent) with a serious health condition; or
- to take medical leave when the employee is unable to work because of a serious health condition.

2) Employer Coverage:

FMLA applies to all public agencies, all public and private elementary and secondary schools, and companies with 50 or more employees within a 75 mile radius.

3) Employee Coverage:

Employees are eligible for leave if they have worked for their employer at least 12 months, at least 1,250 hours over the past 12 months, and work at a location where the company employs 50 or more employees within 75 miles. Whether an employee has worked the minimum 1,250 hours of service is determined according to FLSA principles for determining compensable hours or work.

Time taken off work due to pregnancy complications can be counted against the 12 weeks of family and medical leave.

B. The National Defense Authorization Act for FY 2008 Amendments to FMLA:

Final rule effective on January 16, 2009, updates the FMLA regulations to implement new military family leave entitlements.

Introduces two new coverages for FMLA:

- Qualified Exigency for Military Family Leave

Up to 12 weeks of leave under these circumstances:

(1) Short-notice deployment; (2) Military events and related activities; (3) Childcare and school activities; (4) Financial and legal arrangements; (5) Counseling; (6) Rest and recuperation; (7) Post-deployment activities; and (8) Additional activities not encompassed in the other categories, but agreed to by employee and employer.

- Serious Injury or Illness of Covered Servicemember

Extends definition of “next of kin” to help disabled servicemember

Allows up to 26 weeks of leave in one year.

C. Notice provision – Letter Opinion in Favor of Employers:

New DOL Letter [FMLA2009-1-A](#) dated January 2009, but not released until May, indicates that Employers may use their consistently enforced rules for calling in when an employee requests FMLA coverage. Here’s the example DOL used in explaining the change:

1. Company policy requires employees to call in one hour before the start of a missed shift to request that the missed time be considered FMLA leave. Failure to call in, unless the employee is unable to do so, results in denial of the request for FMLA leave.
2. Employee takes two consecutive days off without calling in.
3. Employee comes in on the third day and says, “Those two days I missed are FMLA leave. By notifying you today, I’m covered by the two-day rule, *even though I could have followed company policy and called in an hour before my first missed day.*”
4. Employer denies FMLA request.

Under the new opinion letter, the employer is in the clear. The two-day rule does not apply because the employee reasonably could have followed the company’s stricter standard call-in procedure. The new letter also notes that if employer denies FMLA when employees do not follow the company call-in procedure:

- Employer will have to make sure the policy is applied across the board to all employees.
- It really has to be an established policy, meaning it must have been used and in force before the employee makes the request.

Note: Opinion letters do not carry the weight of law, but they do indicate how an agency might rule on similar cases.

Ragsdale Decision now a regulation – Employer cannot be forced to “categorically” provide more than 12 weeks of leave due to administrative error.

Light Duty – Does not count against FMLA

“Serious Health Condition” – 3 or more consecutive days off and two visits to the doctor within 30 days. First doctor visit must happen within first 7 days.

Substitution of Paid Leave – Vacation or Sick Leave now counts the same. Can force employee to burn all available paid leave while on FMLA.

Perfect Attendance Awards – No longer an exposure under FMLA – Be consistent!

Employer Notice – Changes time from 2 days to 5 days. Employer to post notice and provide either employee handbook info or handout at time of employment.

Employee Notice – Employee may provide notice up to 2 full business days after the start, except as noted in Letter Ruling above.

Medical Certification Process – Persons working for Employer may contact medical provider to obtain relevant information including, HR, medical professional, leave administrator or member of management, other than employee’s direct supervisor.

Employer can require recert not more often than 30 days or less, if the employee is due back in less than 30 days.

Fitness for Duty Certification – 1) able to perform “essential functions” or 2) With intermittent leave, that employee can actually continue to perform regular job.

Special Issue: Terminating Employees while on FMLA leave.

FMLA FORMS ON LINE

Employer Notice Poster – WH 1140 – See:

<http://www.dol.gov/esa/whd/regs/compliance/posters/fmlaen.pdf>

Eligibility Notice Form – Parts A and B – See:

<http://www.dol.gov/esa/whd/forms/wh-381.pdf>

Certification of Serious Health Condition by Employee:

<http://www.dol.gov/esa/whd/forms/WH-380-E.pdf>

Certification of Serious Health Condition for Employee's Family Member:

<http://www.dol.gov/esa/whd/forms/WH-380-F.pdf>

Designation Notice – Approved/Disapproved:

<http://www.dol.gov/esa/whd/forms/WH-382.pdf>

Certification for Qualified Exigency for Military Family Leave:

<http://www.dol.gov/esa/whd/forms/WH-384.pdf>

Certification for Serious Injury or Illness of Covered Servicemember for Military Family Leave:

<http://www.dol.gov/esa/whd/forms/WH-385.pdf>

DAVID D. SCHEIN

President and General Counsel of Claremont Management Group, Inc., he provides consulting on employment and business matters to many businesses and entrepreneurial ventures. His expert analysis and counsel in employment and business law matters is based on over twenty-five years of practical experience, including a decade with Fortune 50 companies.

During his extended career, he has had the opportunity to work with some of the world's largest corporations and some of the country's smallest. He enjoys the challenge of making business function at the next level. His business philosophy is founded in courses at the Wharton Graduate Business School and an earned MBA at the Colgate Darden Graduate Business School of the University of Virginia. His skills have been sharpened by extensive and varied business situations. Dr. Schein describes his management approach as: "Applied Linear Thought." This involves doing things that make sense and avoiding complex "solutions" that many times do not work as well as common sense. Dr. Schein works nationwide with businesses in achieving a more productive workforce. Dr. Schein is also assisting health care providers, insurers and employers in compliance issues related to the privacy and security provisions of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). His extensive experience in legislative analysis, policy development and training makes him a valuable resource.

Known as an excellent speaker in person and in the media, he has done numerous seminars and lectures from New York and Florida to California. On the lecture circuit, he is known as the "Employment Guru" due to his depth of understanding of employment issues, and his ability to explain the possible approaches and solutions. He is presently teaching graduate courses in employment law, business ethics, human resources, labor law and business law. His primary topics involve employment issues, HIPAA implementation, business law and dispute resolution matters.

He has been published in numerous national and regional publications and is the editor of Claremont Management Group's *Employment Notes* newsletter. He is also host of the *Its Your Job!* radio program.

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