EXPERT UPDATE

DOL Provides Guidance on FMLA Leave to Care for Adult Children

HENDERSON BROTHERS

DOL Provides Guidance on FMLA Leave to Care for Adult Children

The Department of Labor (DOL) issued an interpretation letter to provide guidance on when an eligible employee may take leave under the Family and Medical Leave Act (FMLA) to care for a child who is 18 years of age or older. In this letter, the DOL:

- Clarifies that the age of a son or daughter at the onset of a disability is not relevant in determining a parent's entitlement to FMLA leave;
- Addresses the impact of the Americans with Disabilities Act Amendments Act of 2008 (ADAAA) on the interpretation of "disability" under the FMLA; and
- Provides guidance on the availability of FMLA leave to care for a son or daughter who becomes disabled during military service.

Employers should review their policies concerning granting FMLA leave to employees with children 18 years of age or older to confirm that they are in line with the DOL's guidance.

BACKGROUND

The FMLA entitles an eligible employee to take up to 12 workweeks of unpaid, job-protected leave during a 12-month period to care for a son or daughter with a serious health condition. The FMLA defines a "son or daughter" as a biological child, adopted child, foster child, stepchild, legal ward or child of a person standing in loco parentis who is:

- Under 18 years of age; or
- 18 years of age or older and incapable of self-care because of a mental or physical disability.

Thus, an eligible employee will be entitled to take FMLA leave to care for a son or daughter who is 18 years of age or older if the adult son or daughter:

- Has a disability as defined by the Americans with Disabilities Act (ADA);
- Is incapable of self-care due to that disability;
- Has a serious health condition; and
- Is in need of care due to the serious health condition.

It is only when all four requirements are met that an eligible employee is entitled to FMLA-protected leave to care for his or her adult son or daughter.

AGE OF DISABILITY ONSET

To be eligible to take FMLA leave for an adult son or daughter, the child must be incapable of self-care due to mental or physical disability at the time that FMLA leave is to begin. In the interpretation letter, the DOL clarifies that it is not a requirement that the disability of the son or daughter occurred or was diagnosed prior to the age of 18. *The onset of a disability may occur at any age for purposes of the definition of a "son or daughter" under the FMLA.*

IMPACT OF ADAAA

In considering an employee's request for FMLA leave to care for an adult child because of the child's serious health condition, the employer must first determine if the child has a disability, as defined by the ADA. In the interpretation letter, the DOL confirms that the ADAAA's broad changes to the ADA's definition of "disability" are incorporated into the FMLA for purposes of determining if an employee is eligible to take leave to care for an adult child.

The FMLA regulations define a physical or mental disability as "a physical or mental impairment that substantially limits one or more of the major life activities of an individual," as these terms are defined by the ADA.

According to the ADAAA, the definition of "disability" *must be broadly construed in favor of coverage for the individual.*

In addition, the ADAAA:

- Expanded the ADA's definition of "disability" by broadening the definition of "major life activities" to include activities such as caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working;
- Provided that the definition of "substantially limited" does not require that the impairment prevent, or severely or significantly restrict, a major life activity; and
- Clarified that an impairment that is episodic or in remission is a disability if, when active, the impairment would substantially limit a major life activity (for example, cancer in remission or a condition with episodic periods of illness, such as multiple sclerosis, asthma, epilepsy or diabetes).

In addition, the ADAAA's regulations provide that some impairments will virtually always qualify as disabilities because, by their very nature, they substantially limit at least one major activity. These types of impairments include, for example, deafness, blindness, intellectual disability, autism, major depressive disorder, bipolar disorder and post-traumatic stress disorder.

According to the DOL, the ADAAA's expanded definition of the term "disability" will enable more parents to take FMLA-protected leave to care for their adult sons and daughters with disabilities, provided that the adult children are incapable of self-care due to their disability and their parents are needed to care for them due to their serious health condition.

Example – An employee's 37-year old daughter suffers a shattered pelvis in a car accident, which substantially limits her in a number of major life activities (such as, walking, standing and sitting). Because of this injury, the daughter is hospitalized for two weeks and under the ongoing care of a health care provider. Although she is expected to recover, she will be substantially limited in walking for six months. If she needs assistance in three or more activities of daily living such as bathing, dressing and maintaining a residence, she will qualify as an adult "daughter" under the FMLA as she is incapable of self-care because of a disability. The daughter's shattered pelvis

would also be a serious health condition under the FMLA and her parent would be entitled to take FMLA-protected leave to provide care for her immediately and throughout the time that she continues to be incapable of self-care because of the disability.

CHILDREN WOUNDED IN MILITARY SERVICE

In the interpretation letter, the DOL notes that its guidance may affect employees needing leave to care for adult children who have been wounded or sustained an injury or illness in military service. The expanded definition of a "disability" under the ADAAA, as well as the clarification that when an adult son or daughter's disability commences is not determinative of whether he or she qualifies as a "son or daughter" under the FMLA, may allow parents of adult children who have been wounded or sustained an injury or illness in military service to take FMLA leave beyond that provided under the FMLA's special military caregiver leave provision.

Example: A father has exhausted his 26 workweeks of military caregiver leave to care for his 20-year old son, a returning service member who sustained extensive burn injuries to his arms and torso. In the next FMLA leave year, the father seeks leave from his employer to care for his son as he undergoes and recovers from additional surgeries and skin graft procedures. The father will be entitled to take up to 12 workweeks of FMLA-protected leave to care for his son because his son's burn injuries that substantially limit his ability to perform manual tasks constitute a disability under the ADA, the son is incapable of self-care due to a disability (that is, he needs active assistance or supervision in bathing, dressing and eating), the son's burn injuries are a serious health condition because they require continuing treatment by a health care provider, and the father is "needed to care" for the son.

MORE INFORMATION

In connection with the interpretation letter, the DOL also issued a set of questions and answers and a fact sheet.

Source: Department of Labor

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