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-

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EMPLOYERS, TAKE HEED: FINAL FMLA RULES RELEASED



*Jeffrey M.
Schlossberg*

The United States Department of Labor recently published new regulations interpreting the Family and Medical Leave Act (FMLA). The changes take effect January 16, 2009. These significant additions and modifications are of critical importance to employers, who will be held responsible for complying with these new regulations.



*Kimberly B.
Malerba*

The most significant changes address the grounds for military service leave that were added to the FMLA earlier in 2008 (See RMF Employment Law Alert issued February 2008). First, a spouse, child, parent or next of kin is permitted up to 26 weeks of leave to care for U.S. military personnel with a serious illness or injury incurred in the line of active duty. Notably, the leave is longer than the traditional 12-week leave and the group of individuals permitted to take this type of leave is broader than those who may take other types of FMLA leave. In addition, the new regulations address the circumstances where leave may be taken when an employee's spouse, child or parent who are reservists or National Guard members have "qualifying exigencies." The term "qualifying exigencies" is defined as: short-notice deployment, military events and related activities, child care and school activities, financial and legal arrangements, counseling, rest and recuperation, post-deployment activities, and additional activities where the employer and employee agree to the leave. Notably, this type of leave is not available to family members of military personnel on active duty.

Other significant changes include:

- Clarifying the term "serious health condition" to add details on the number of, and time frame for, required doctor's visits.
- Prohibiting an employee's direct supervisor from contacting a health care provider for medical certification.
- Permitting employers to consider FMLA absences in determining bonuses and other incentive rewards.
- Permitting employers to require employees to substitute all forms of paid leave regardless of the reason for the leave.
- Publication of new medical certification forms.

Because the regulations require that FMLA policies be contained in company employee manuals, employers must now revise their manuals to incorporate these recent changes. Failure to do so constitutes a violation of FMLA.

NEW REQUIREMENTS ON CRIMINAL BACKGROUND CHECKS

New York law provides that upon an applicant's written request, an employer with 10 or more employees is required to provide the applicant with information about any consumer reporting agencies that were used in the hiring process. Effective February 1, 2009, employers will also have to include a copy of Corrections Law Article 23-A. Corrections Law Article 23-A, with limited exceptions, makes it unlawful to deny employment because of a previous criminal conviction.

In addition, New York law was amended to address the situation where employers were faced with claims of negligent hiring following employment of a person with a criminal history who then engages in harmful conduct. Now, where an employer makes a good faith, reasonable determination to hire someone with a criminal history consistent with the provisions of Article 23-A, evidence of the employee's past criminal record may be excluded. This amendment was intended to protect employers so that they would be more inclined to hire those with criminal histories.

Finally, the new law requires that employers post a copy of Article 23-A in a conspicuous manner and accessible location in the workplace.

With the passage of the new law, it is clear that the Legislature sought to provide greater protections to individuals with criminal records. It likely follows that greater attention will be given by plaintiff's attorneys and the State Division of Human Rights to the issue of background checks and how they impact applicants and employees with criminal histories. Employers are encouraged to review their background check procedures and consult with qualified employment law counsel to ensure compliance.

If we can be of assistance, do not hesitate to contact us.

Upcoming Free Seminar

Workplace Risks You May Have Overlooked: Are You Prepared?

Wednesday, March 25, 2009
8:00 a.m. – Registration and Networking
8:30 a.m. – Program
at the law offices of Ruskin Moscou Faltischek, P.C.
1425 RexCorp Plaza, Uniondale, New York 11556

Jeffrey M. Schlossberg, Esq.

Partner & Chair, Employment Law Practice Group, Ruskin Moscou Faltischek, P.C.

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