Northwest Ohio Human Resource Association

AFFILIATE OF SHRM SOCIETY FOR HUMAN RESOURCE MANAGEMENT

LEGISLATIVE UPDATE

February 2018

Happy Birthday FMLA!

On February 5th the FMLA turned 25. Not so ironically, it was also the Monday after the Super Bowl, a day when employers can expect to see a rise in the number of "sick" call offs. In its 25 years, FMLA has proven difficult to administer even for a seasoned professional. Nuanced rules and employee ingenuity have coupled to make FMLA's unpaid leave requirements expensive for employers to manage. As FMLA reaches its first quarter century, let's look at some of the issues that you maybe haven't considered in a while.

Minor Children vs. Adult Children

One of the hallmarks of FMLA is that it allows employees to not only use leave for themselves but also for children in need of care. The administration of FMLA requests to care for minor children are handled on the same grounds that an employee would be entitled to receive FMLA leave for themselves. But what about adult children?

In order to take FMLA leave for an adult child, the child needs to be disabled *and* be incapable of self care. In addition, the adult child must meet the usual requirements for FMLA leave — they have a serious health condition and need care because of that health condition. The term "disabled" is defined within the FMLA as a mental or physical impairment that limits one or more major life activities. The term "incapable of self-care" is defined within the FMLA as needing active assistance or supervision with 3 or more activities of daily living (e.g., grooming and hygiene, bathing, eating, dressing, cooking, shopping, using a telephone, cleaning). The adult child does not need to be permanently disabled in order to qualify, and they may pass in and out of the definition of "disabled" over time, but to qualify they should be "disabled" at the time of the application.

The consequence of this distinction between adult and minor child is that employers may have employees whose children's care qualify for FMLA certification as a minor, but fail to meet the higher standard for certification upon reaching their 18th birthday. You should be cognizant of this change as your employee's children pass into adulthood.

Discipline for improper call offs

While you cannot discipline for absences under FMLA, you can discipline individuals who fail to properly call off with FMLA absences if the circumstances are such that they could have followed the call off procedures. Additionally, individuals who are using FMLA to cover doctors appointments or other situations in which they have advance warning of the absence, should still follow your company's procedures for requesting time off. While the requests cannot be improperly denied by the employer, the employer can expect employees to follow the procedures with the required notice when possible, and discipline for failure to follow the proper procedure.

OSHA 300A form deadline

February 1st was the deadline to prepare, certify and post the OSHA 300A Annual Summary of workplace injuries and illness. The Form 300A is a summation of the workplace injuries and illnesses recorded on the OSHA 300 Logs during the previous calendar year, as well as the total hours worked the previous calendar year by all covered employees. By February 1st of every year, employers must:

- Review their OSHA 300 Logs;
- Verify that the entries on the 300 Log are complete and accurate;
- Correct any deficiencies identified on the 300 Log;
- Use the injury data from the 300 Log to calculate an annual summary of injuries and illnesses and complete the 300A Annual Summary Form; and
- Certify the accuracy of the 300 Log and the 300A Summary Form.

Employers often make mistakes related to this annual injury and illness recordkeeping duty allowing for citations and penalties imposed by OSHA. To the right, we have provided some of the most common errors and how to avoid them.

CERTIFY

- The 300A form must be certified by a "company executive" (owner, officer, the highest ranking company official working at the establishment for which the 300A Form is completed.
- Executive must certify that they have examined the Logs and the Form
- Executive must certify they reasonably believe the information is accurate and complete.

POST

- The 300A form must be posted in a location with general employee notices.
- Should remain posted for at least 3 months
- Must be completed and posted even if there are NO recordable injuries or illnesses to report

MAINTAIN & UPDATE

- Employers must retain the Logs and printed, certified, and originally signed 300A form for five years.
- Prior years' 300A Forms must be updated with new information as it becomes available during the 5 year retention period.

Dating Policy or Not

In light of the #MeToo movement, employers are scrambling to revisit their policies, with a focus on reporting and investigation of sexual harassment/discrimination claims. However, another question looms large for employers: what should companies do about their dating policies?

Often, sexual harassment/discrimination claims are made against supervisors by their subordinates. In quid pro quo harassment claims, companies invariably will argue the relationship giving rise to the claim was consensual in nature, which invokes scrutiny of the relationship between the supervisor and subordinate. Historically, the workplace has been fertile ground for intimate relationships among co-workers and between supervisors and subordinates.

According to CareerBuilder's 2018 Valentine's Day Survey, 36% of workers report dating a co-worker, 30% report dating someone with a higher position, and 20% report dating their supervisor. While 31% of reported intimate relationships have resulted in marriage, 24% of reported relationships involve affairs where one of the co-workers is married. Certainly, office relationships may form the basis for legitimate sexual harassment/discrimination claims. On the other hand, sour relationships may give rise to false harassment claims or allegations of favoritism by other employees. Either way, office relationships can create risks for employers and challenges for HR departments.

Dating policies are not new, but, are not universal among employers. If employers are considering adopting a dating policy or revisiting an existing policy, here are some questions to address:

- To what extent does your company want to police the behavior of its employees? Are relationship policies too intrusive?
- How broadly should a relationship policy apply? Does it apply to one-night sexual encounters? Does it apply to platonic dating?
- How does a company enforce relationship policies? Should discipline result from noncompliance? Should employees in intimate relationships sign a "love contract?"
- What is the effect of relationship policies on morale and recruiting?
- Should a relationship policy apply to vendors and business associates?

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