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Department of Labor Issues New Guidance on FMLA Leave to Care for Adult Children

By Matthew J. Feery

On January 14, 2013, the Department of Labor's Wage and Hour Division issued an **Administrator's Interpretation** that clarifies its stance on the ability of employees to take leave under the Family and Medical Leave Act ("FMLA") to care for an adult child with a disability. The Administrator's Interpretation, which reflects the current view of the Department of Labor regarding the interpretation of a statute or regulatory issue, also shows the impact of the Americans with Disabilities Act Amendments Act of 2008 ("ADAAA"), which broadened the definition of the term "disability" under the Americans with Disabilities Act ("ADA"), on the FMLA.

Most employers are aware that employees can take FMLA leave to care for a son or daughter with a serious health condition. However, the scope of allowable leave narrows once an employee's son or daughter reaches 18 years old. At that point, a parent is entitled to take FMLA leave only when all four of the following occur: (1) the adult son or daughter has a disability as defined by the ADA; (2) he or she is incapable of self-care due to that disability; (3) he or she has a serious health condition; and (4) he or she is in need of care due to the serious health condition.

Prior to this Administrator's Interpretation, there had been some confusion regarding whether the onset of the child's disability had to occur before the child reached 18 years of age. The interpretation clarifies that it does not - so long as the child at issue has a disability under the ADA, the parent may qualify for FMLA leave even if the child developed the disability as an adult. In other words, the age of the child at the onset of the disability is immaterial.

The Administrator's Interpretation also reflects the impact on the FMLA of the ADAAA's expansion of the definition of "disability" under the ADA by, in part, broadening the definition of "major life activities." Since the FMLA's inception, the Department of Labor has adopted the ADA's definition of disability for purposes of defining a son or daughter 18 years of age or older. Thus, when the 2008 amendments to the ADA broadened the definition of "disability," the category of adult children over 18 years old falling under the FMLA's definition of "son or daughter" was similarly widened.

The impact of the broadened definition of "disability" is perhaps best seen when looked at in conjunction with the requirement that an adult son or daughter be "incapable of self-care due to that disability." FMLA regulations define "incapable of self-care" to mean that the adult child in question requires active assistance or supervision to provide daily self-care in at least three "activities of daily living" or "instrumental activities of daily living." The former term includes things such as bathing, hygiene, dressing, and eating. The latter term includes activities such as cooking, cleaning, shopping, and paying bills. Under the revised ADA, an impairment does not necessarily need to be permanent in order to constitute a disability. Thus, if an adult child suffers a temporary impairment and cannot perform three or more of the aforementioned activities, then the parent of the adult child may be qualified to take FMLA leave.

By way of example, the Administrator's Interpretation provides the scenario of an adult child who suffers a shattered pelvis in a car accident. The adult child is expected to make a full recovery, but in the meantime the adult child requires several weeks of hospitalization and will be substantially limited in walking for six months. If that adult child requires assistance in three or more of the activities discussed above, then in the Department of Labor's view the child would have a disability for which the child's parent could take FMLA leave.

Finally, the Administrator's Interpretation recognizes that the new clarifications on leave to care for an adult child may impact an employee's eligibility for leave to care for an adult child wounded in military service. The FMLA allows a parent of a covered servicemember who sustained a serious injury or illness to take up to 26 weeks of leave in a single 12-month period. However, a servicemember's injury may last beyond that 12-month period. The Administrator's Interpretation clarifies that the parent of such a servicemember may be allowed to take FMLA leave in addition to leave provided under the FMLA's military caregiver provisions. Thus, if the parent of a servicemember takes the full 26 weeks of leave during one 12-month period, that parent may be eligible to take an additional 12 weeks of FMLA leave in the next leave year, so long as the servicemember's injuries meet the four requirements discussed above.

The Administrator's Interpretation is the latest example of the Department of Labor construing leave laws generously. Employers who have employees request leave to care for an adult child with a disability will have to make a case-by-case determination on whether the employee qualifies for

the leave sought.

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