Shipman & Goodwin LLP

Employer Alert

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CONNECTICUT FMLA COMPLICATES COMPLIANCE WITH FEDERAL LAW

While the Federal Department of Labor has issued new regulations covering employers with 50 or more employees, this has not brought an end to the conflicts with Connecticut law, which covers employers with at least 75 employees.[1] There are state and federal requirements that are different. Where inconsistencies exist, employers subject to both laws are required to follow the provision that is most favorable to the employee. The following highlights some of the areas where conflicts persist due to statutory differences between state and federal law. There is a conflict over how much time an employee must work to be eligible for leave.[2] There is also a conflict between how much leave an employee can take and who can take leave.[3]

Under the new federal regulations, employers must satisfy multiple notification requirements, including a general notice of FMLA rights, eligibility notice, rights and responsibilities notice, and designation notice. The time period pertaining to these notices has been expanded to 5 business days.[4]

The federal regulations permit employers to seek a more detailed statement of "fitness for duty" when an employee returns from leave, including whether the employee can perform the essential functions of the job, so long as the employer follows the proper procedures during the designation of leave period by providing the employee with a list of job duties and essential functions. Connecticut does not permit or follow this approach.[5]

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1 Connecticut law exempts public sector employers, including school boards, municipalities, and state agencies. It also exempts private or parochial elementary or secondary schools.

2 Connecticut law only requires 1,000 hours of actual work for an employee to be eligible for leave as opposed to the 1,250 hour requirement under federal law.

3 Connecticut law provides 16 weeks of leave in a 24-month period, and does not permit a "key employee" exception in contrast to the federal law that provides for 12 weeks of unpaid leave in a 12 month period and has a key employee exception.

4 In Connecticut, employers still only have 2 business days to provide written designation of leave notices to their employees.

5 All that an employer can request and require is a "simple statement" of employee's ability to return to work. While under the federal regulations, an employer can follow up with the employee's treating medical provider to authenticate or clarify the medical certification, without a release, that is prohibited in Connecticut. In Connecticut, the rule will continue to be that only the employer's health care provider can make contact with the employee's health care provider and only with the employee's permission.

Under the federal regulations, if an employee, who has qualified for intermittent leave, fails to specifically reference the reason for the time off, an employer can delay approval, unless there are unusual circumstances. Connecticut does not follow this approach.[6]

There are new federal medical certification forms for an employee's own serious health condition and for certification of a qualifying family member's serious health condition. These forms do not comply with Connecticut's requirement as the federal form includes a request for a diagnosis from the employee's health care provider.[7]

When the employee provides the completed medical certification, if there is a need to call a health care provider directly for the purposes of authenticating or clarifying the information, the federal regulations permit such direct contact.[8] Connecticut does not.[9]

When there is a question of the employee's continuing eligibility for FMLA, the federal regulations allow the employer to request a recertification of the condition and to have the employee be responsible for the expense associated with that recertification. Connecticut does not permit that cost shifting.[10]

The federal regulations permit an employer to require a fitness for duty certification every 30 days for an intermittent or reduced schedule FMLA leave, if there is a reasonable safety concern about an employee's ability to perform his/her duties. This is not permitted under Connecticut law.

The new federal regulations make clear that both mother and father are entitled to FMLA leave for the birth of a child and for care of the newborn during the 12-month period beginning after birth of the child. Also, a "husband" may take leave to care for a pregnant spouse with a serious health condition. Connecticut law is more expansive.[11]

Under the federal regulations in determining eligibility for intermittent leave or a reduced schedule when an employee's hours have varied, an employer must determine the number of hours worked for intermittent or reduced schedule leave by taking an average of the employee's hours for the prior 12 months. Connecticut does not follow this process.[12]

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6 Connecticut believes that it is reasonable to expect an employee to identify an absence as FMLA when it is for a previously identified and qualified reason, however, the failure to do so cannot be the basis for delaying or denying the leave as long as the employee gives timely verbal notice or some other form of notice, even if not it does not comply with the employer's procedures.

7 In Connecticut, an employer cannot ask for a diagnosis. If the federal form is going to be used in Connecticut, the questions concerning a diagnosis must be crossed-out, whited out or masked in some way. Other parts of the federal form that differ from Connecticut's requirements also should be amended. For example, the 1000 hours requirement in Connecticut law versus the 1250 hours under the federal law.

8 The contact should be by a human resource person or manager, but cannot be by the employee's direct supervisor.

9 Such direct contact with the employee's health care provider is not permitted under Connecticut law. Instead, an employer must have only its own medical consultant contact the employee's health care provider to get the clarification with the employee's permission.

10 Under Connecticut law and regulations, whatever expense is not covered by an employee's health insurance must be paid for by the employer.

11 It is not limited to a mother and husband, but instead provides for leave for non-traditional families with two mothers or two fathers in a same-sex relationship. Also, in Connecticut the term "spouse" is used instead of "husband." The Connecticut law is not exclusive to a male/female marriage and includes both same-sex civil unions and same-sex marriages.

12 Instead, an employer must use the 16 weeks prior to the beginning of the leave period to calculate the hours of an employee who has a varied schedule.

Federal law now allows employers to deny a bonus that is based on specific performance to an employee who has not achieved the goal due to an FMLA absence, e.g. bonus for perfect attendance. Connecticut prohibits such a denial where the employee is being penalized for taking an approved leave.

Light duty assignments and reinstatements are also handled differently.[13]

This brief review highlights the complications faced by Connecticut employers. Employers with facilities and offices outside of Connecticut will find that at some locations the rules will be different and that a special effort must be undertaken to be sure to comply with the Connecticut law. If you wish to view a prior alert outlining the changes in the law, please click here or visit http://www.shipmangoodwin.com/Publications/Detail.aspx?pub=507.

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13 Under federal law, when an employee accepts a light duty assignment, the employee has a right to have his/her job restored only until the expiration of the applicable FMLA 12-month leave period even though working in a light duty position cannot be counted as FMLA leave time. Connecticut does not allow for the cut off of job restoration rights after 12 months, but instead extends the time to 24 months.

QUESTIONS OR ASSISTANCE?

This alert is intended only to highlight some of the key differences between federal and Connecticut law. If you have specific questions on FMLA compliance, please contact Gary Starr at (860) 251-5501, Henry Zaccardi at (860) 251-5737 or Eric Lubochinski at (203) 324-8154.

SHIPMAN & GOODWIN LLP
COUNSELORS AT LAW

One Constitution Plaza
Hartford, CT 06103-1919
(860) 251-5000

300 Atlantic Street
Stamford, CT 06901-3522
(203) 324-8100

289 Greenwich Avenue
Greenwich, CT 06830-6595
(203) 869-5600

12 Porter Street
Lakeville, CT 06039-1809
(860) 435-2539

www.shipmangoodwin.com