

Sandberg, Phoenix & von Gontard, P.C.

Employment Law Update

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FMLA Expanded to Provide Servicemember Leave Rights

For the first time since its passage in 1993, the Family and Medical Leave Act ("FMLA") has been amended to provide new and greater leave entitlement rights. Specifically, the recent National Defense Authorization Act signed by President Bush amended FMLA to permit an employee to take a leave of absence for up to 26 weeks in order to care for any member of the military who is receiving medical treatment.

Most employers are familiar with the circumstances that permit an employee to take a FMLA leave. Such leave typically entails either the birth or placement of a child or the serious health condition of either of the employee, a spouse, child, or parent. Now employers will be required to permit an eligible employee who is either the "spouse, son, daughter, parent, or next of kin" to take up to 26 weeks of leave during a 12 month period of time in order to care for a service member.

A covered service member is not only a member of the Armed Forces, but also includes a member of the National Guard or Reserve. A leave is now available when the service member is receiving medical treatment, recuperating or is otherwise designated on a temporary disability retired list due to the underlying injuring or illness. Finally, the definition of an injury of illness that triggers a FMLA leave for a service member is potentially broader and only requires that the underlying injury or illness was incurred "in line of duty on active duty" such that the service member is unable to "perform" the duties of their office, grade, rank or rating of the servicing member.

The entitlement to a 26 week leave of absence in the case of a service member who is injured or ill may be reduced by any other FMLA leave that the employee has taken during the 12 month period of time for a traditional reason. Furthermore, and similar to the circumstances where both a husband and wife work for the same employer, the service member leave entitlement may be limited to a total of 26 weeks for both employees. Finally, a service member leave under the FMLA may be taken intermittently or on a reduced schedule and an employer may transfer the employee to an alternative position.



The universe of eligible employees for a service member leave is broader than the universe of eligible employees who are otherwise entitled to a traditional FMLA leave. Specifically, the service member leave is also available to any employee who is the "next of kin" to the service member. The next of kin is defined generally to mean the "nearest blood relative of that individual." How someone is determined to be the nearest blood relative will certainly be subject to further debate and may be addressed in future DOL regulations.

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As with other circumstances permitting a FMLA leave, the employee can require either the employee or the “next of kin” to timely provide a certification for the need to a service member leave. Furthermore, while an employer may require the employee to substitute any accrued paid time off associated with a service member leave, the employer is not required to provide paid time off in such circumstances.

The changes to the FMLA permitting a service member leave became effective when President Bush signed the National Defense Authorization Act on January 28, 2008. Employees should review existing FMLA policies that are posted or otherwise included in employee handbooks and revise in order to outline the additional circumstances which are now permissible under the FMLA. Further, Illinois employers with at least 15 employees will have to coordinate the service member leave under the FMLA with the Illinois Family Military Leave Act that was enacted in 2005 that permit in other circumstances employees to take a leave of absence due to military service. As always, the SPvG employment law team is available to assist and revise existing policies to ensure full compliance.

This change to the FMLA is not presently effective until such time as the Secretary of Labor issues final regulations.

**FMLA Expanded
to Permit Employees to Take a Leave of Absence
Due to Any Qualifying Military Exigency**

While the revisions to the FMLA permitting a service member a leave of absence arising from any injury or illness of a service member is effective immediately, the National Defense Authorization Act additionally revised the FMLA to permit a leave of absence “because of any qualifying exigency” arising from the military service of a spouse, son, daughter or parent who is serving on active duty. When an exigency exists that would permit a leave of absence under the FMLA shall solely be determine by the Secretary of Labor. Because the National Defense Authorization Act did not provide any guidance as to when such exigency may be declared, or under what circumstances, this change to the FMLA is not presently effective until such time as the Secretary of Labor issues final regulations.



Wage/Hour Actions Continue To Rise

The Department of Labor (“DOL”) enforces the Fair Labor Standards Act (“FLSA”) and recently reported increased enforcement actions and monetary relief during the last fiscal year, ending on September 30, 2007. Primarily, claims under the FLSA involve either minimum wage or overtime claims filed on behalf of employees. During fiscal year 2007, the DOL obtained over \$180 million in back wages to more than 300,000 employees. Of this amount, \$160 million was associated with overtime violations.

The back wages collected by DOL for overtime violations include not only the failure to pay non-exempt employees overtime, when required, but also included back wages for employees who were improperly classified as exempt employees. In fiscal year 2007, the DOL collected over \$16 million for employees that were misclassified as exempt, typically under the administrative exemption. The back wages collected for a misclassification represented an 18% increase over the back pay obtained by the DOL for misclassifying workers from during the prior fiscal year. This trend is consistent with the overall increase in litigation by employees in private actions challenging their exempt status.

In addition to an increased emphasis regarding exempt status determinations, the DOL continues to target its enforcement actions at certain industries. Specifically, the DOL acknowledges that it focuses on what it views as low-wage industries such as agricultural, daycare, restaurants, garment manufacturing, guard services, health care, hotels/motel, janitorial and temporary help employers. According to the DOL, nearly 40% of its enforcement resources are designated to these nine industries.

Sandberg, Phoenix & von Gontard Wins Employment Discrimination Trial

Tom Berry and Bryan Cavanaugh of Sandberg, Phoenix & von Gontard, P.C. successfully defended a case alleging race, gender and age discrimination claims in federal court.

The Plaintiff in this case claimed he filed a number of applications for job openings by e-mail. The employer did not even receive most of those applications. For the remainder, the employer was able to prevail by demonstrating it acted consistently with its policies and procedures for job hirings and requirements for the job openings. The employer also showed that the Plaintiff's credentials did not make him qualified, or at least as qualified, as the person who was hired. The employer relied heavily on the fact that it filled the position with an internal candidate, which the federal court agreed, was a legitimate reason to choose an external candidate over another.

A legal issue that arose at trial is the presumption that a properly addressed communication, such as a letter, fax, or e-mail, if sent by a reliable means, was received. SPvG's client had to confront this presumption, and successfully overcame it at trial. While the Plaintiff produced a hard copy of a properly-addressed e-mail

and testified he sent it to the employer, SPvG put on evidence on behalf of the employer that it did not receive that application, and there were a number of electronic road blocks along the way from Plaintiff's computer to the employer's computer that could have stopped and deleted the alleged e-mail application. It is difficult to prove a negative, but the employer was able to overcome this presumption at trial.

This case raised noteworthy legal considerations of best management practices in receiving e-mail applications, sending automated responses to applicants that the applications have been received, and storing applications, either electronically or in hard copy format. It is usually a good practice for an employer to set up its e-mail application system such that it automatically sends out an e-mail acknowledging receipt of the application. Additionally, it is advisable to maintain e-mail logs and these e-mail applications for at least a year after a job posting to comply with the EEOC's general record retention requirements.

SPvG's employment law team is now even better able to advise on proactive steps an employer can take in verifying what e-mail applications they actually received. These steps would be helpful in defending against an EEOC charge, lawsuit, or affirmative action audit.



New Illinois Employment Laws for 2008

In addition to other new Illinois laws that took effect on January 1, 2008, such as the Smoke Free Illinois Act, The Illinois Human Rights Act was amended to require Illinois police and fire departments to transfer pregnant officers and firefighters to less strenuous or hazardous duties during the pregnancy, if the officer or firefighter asks and with the "advice of her physician." Refusal to do so could prompt fines or other legal penalties. The employee must request the transfer, her physician must approve of it, and the transfer must be capable of being reasonably accommodated. Many times, these requests will also trigger rights under the Family and Medical Leave Act ("FMLA"). While this new Illinois Human Rights Act amendment entitles, in some circumstances, pregnant employees to light

Illinois Human Rights Act



duty positions, the FMLA could entitle them to time off from work due to pregnancy before or after the light duty assignment. Illinois employers must coordinate their compliance with both the Human Rights Act and FMLA in these circumstances.

Second, employees can now take more paid time off to donate blood or blood platelets, pursuant to Public Act 095-0354, which amended the Illinois Organ Donor Leave Act. Before the amendment last month, an employee could take up to one hour to donate blood every 56 days, and could take up to two hours to donate blood platelets. Now, an employee can take up to one hour "or more" to donate blood every 56 days, and up to two hours "or more" to donate blood platelets. This does not give the HR department of an Illinois employer much guidance on limiting this time off, but it appears this new law entitles essentially unlimited leave to donate blood and blood platelets, as long as the other details of the statute are followed. This remains paid leave, and an employer cannot even force an employee to take sick or vacation leave to make these donations.

**An Employer Cannot
Unilaterally Void an Employment Contract**

In this case, the employer terminated the employee's employment without cause. Under the clear terms of the employment contract, it owed the employee a large severance payout. The employer refused to pay it, and the Missouri Court of Appeals for the Western District upheld the trial court's summary judgment for the employee. The Court of Appeals noted the employer's reasons for refusing to pay the severance payout were vague, far-fetched, and unsupported by legal authority.

Kurt Stephenson had worked for the Village of Claycomo for over 14 years, most recently as fire chief. On March 11, 2003, the parties entered into an employment agreement, which contained a provision that if Stephenson was terminated without cause, he would be immediately entitled to a lump sum payment equal to five years of his annual gross salary. One year later, on

March 8, 2004, the Village's board of trustees declared the employment agreement "void and for naught," and ordered Stephenson to accept another employment agreement with terms more favorable to the Village. Stephenson rejected this unilateral attempt to change his agreement and filed suit seeking damages in the form of the severance pay, which totaled \$331,687.25.

The Court of Appeals affirmed the judgment for the former employee. Interestingly, the Village claimed that Stephenson's employment with the Village was separate from his written employment agreement with the Village. Therefore, the Village's unilateral attempt to revoke the employment agreement did not end Stephenson's employment. The trial court and the Court of Appeals disagreed, noting that Stephenson's employment was synonymous with his written employment agreement with the Village. The Village's revoking the employment agreement had the effect of terminating Stephenson's employment. Stephenson's employment and employment agreement were necessarily linked.

Another Pro-Employee MHRA Disability Decision

A long-time employee of DaimlerChrysler was discharged after a long medical leave. In *Lomax v. DaimlerChrysler Corporation*, the employee, a 34-year employee, challenged his July 2003 termination in St. Louis County Circuit Court. During his employment, he has previously taken long medical leaves (12-year disability leave for nerve damage and a 19-month leave for injuries to his right foot and left arm).

After the employee was terminated when he attempted to return to work after his last medical leave, the trial court granted summary judgment to the employer based on lack of evidence of illegal motive. However, the Court of Appeals reversed due to conflicting evidence of motive in discharging the employee. It emphasized that summary judgment should seldom be used in employment discrimination cases and that the employee's disability must be only a "contributing factor" to the termi-

nation decision. The Court of Appeals reversed the trial court's grant of summary judgment to the employer because the employee had raised a sufficient issue with respect to the credibility of the employer's offered reasons for the termination.

The employer offered three reasons for the termination. The Court of Appeals said, "[t]he credibility of an employer's explanation of a challenge of discharge is material in a discrimination case." Citing law that summary judgment should rarely be granted in fact-intensive employment discrimination cases, that all fact disputes must be resolved in the employee's (non-movant's) favor, the Court of Appeals concluded summary judgment had been entered improperly. The Court of Appeals also rejected the notion that an employee must prove that unlawful discrimination was "a substantial or determining factor," but an employee must prove only that the unlawful discrimination merely "contributed to the unfair treatment."



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