

FMLA

FAMILY & MEDICAL LEAVE ACT

Policy,
Practice &
Legal Update

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FMLA Policy Points

2010 Changes Affecting FMLA, Families, and Paid Leave

As the new decade begins, so do more changes to the FMLA, childcare incentives, and paid leave initiatives in Congress. These changes will impact not only the ways in which employers administer leave programs, but also the ways in which employees will be compensated for family and medical needs.

New FMLA Regs On the Way

The U.S. Department of Labor (DOL) has indicated further changes to the FMLA regulations to take place in 2010. In the DOL's annual regulatory agenda, issued in December 2009, DOL stated that it would undertake the "review the implementation of the new military family leave amendments to the Family and Medical Leave Act that were included in the National Defense Authorization Act for FY [fiscal year] 2008, as well as other provisions of the FMLA regulations that were revised and implemented in January 2009."

Presumably, any proposed regulations will contain most recent family military leave certification forms, reflecting the new definitions for exigency and servicemember caregiver leave.

DOL's regulatory agenda (found at www.dol.gov/asp/regs/unified_agenda/fall_2009_Regulatory_Plan.pdf) "highlights the most noteworthy and significant regulatory projects that will be undertaken by its regulatory agencies." The changes to FMLA's regulations were among the many regulatory projects on DOL's "To Do" list. According to DOL's Wage and Hour Division, charged with enforcing the FMLA, "this regulatory

initiative assists in achieving the Secretary's goal of workplace flexibility for family and personal caregiving and, particularly through the job protection and the maintenance of health benefits provisions, helps middle-class families remain in the middle class."

BLR® will be monitoring and reporting on the proposed regulations as they are issued, and will fully report on any final regulations and the impact they will have on employers.

Childcare and Development Block Grants

The White House Task Force on the Middle Class announced childcare grants to states to offer childcare assistance to lower-income working families and support state initiatives to bolster the quality of child care.

The White House proposes adding \$1.6 billion in to the preexisting Child Care and Development Block Grants (CCDBG) to allow 235,000 additional children to be served and to work with Congress to improve the quality of care through a reauthorization of CCDBG and a new Early Learning Challenge Fund currently being considered by the Senate.

The White House also proposes increasing the Child and Dependent Care Tax Credit, which offsets a part of the child and dependent care expenses that families incur in order to work. The proposal would significantly increase the credit for families making up to \$85,000 per year, and families with incomes up to \$115,000 would receive an increase in the credit.

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BLR®

Train Managers on FMLA Basics Before Terminating an Employee

During training, make sure managers and supervisors understand the importance of documentation and consulting with HR before terminating an employee.

In a recent court case, an employer had documentation to show that it had terminated a worker due to performance issues, despite her claim that she was fired in retaliation for taking leave under the Family and Medical Leave Act (FMLA).

What Happened

In 1985, "Addison" started working at the Teachers' Retirement System of the State of Illinois (TRS), which administers the pension plan that provides monthly retirement benefits to about 82,000 retired teachers in Illinois.

She became a Payroll Clerk IV in 2000 and was primarily responsible for enrolling members in an electronic fund transfer (EFT) program, entering EFT information into a database, verifying bank routing and account numbers and responding to change of address requests from beneficiaries.

Initially, she received favorable performance reviews, but errors in her work and increasing absences over time resulted in lower performance ratings. In June and July 2005, she missed 25 percent and 40 percent of her scheduled workdays, respectively. In addition, as of June 2005, she had not yet complied with the payroll insurance manager's request for her to train employees from other departments on the EFT process.

In late July 2005, the manager informed Addison that he would

withdraw his recommendation for her to receive a promotion due to her absenteeism, and he told her to train Data Services Department employees on the EFT process by September 2005.

During that month, several errors within the EFT system were traced to Addison, and because she was absent, other employees had to field complaints from members who had trouble receiving their benefit payments.

In a September 20, 2005, memorandum, the manager summarized a meeting with Addison about her EFT errors, the impact of her absences on other TRS employees, and the company's decision to move the processing of payroll deduction plan applications to another department due to her failure to process them in a timely manner. The manager again asked her to train employees on the EFT process.

The HR director met twice with the manager and the deputy director of the Benefits Department in the fall of 2005 to discuss Addison's performance problems and complaints from fellow employees.

After learning that she might be eligible for FMLA leave, Addison applied for intermittent leave for tennis elbow and later modified her FMLA application to request intermittent leave for treatment of ovarian cysts.

She missed 6 days of work in October and 8 days in November related to her FMLA leave, but was also absent for non-FMLA reasons for 9 days in December and 5 days in January 2006.

In a third management meeting about Addison's performance, the HR director was told that Addison's lack of improvement had resulted in TRS failing to get benefits payments to its members, and there was a large backlog of EFT forms that she had not entered into the system on several occasions. The manager suggested that Addison be fired, and the HR director made the same recommendation to the executive director in two meetings about Addison's performance.

Without any knowledge of Addison's FMLA leave, the executive director decided to fire her on February 3, 2006. She later filed suit, claiming that she had been terminated in retaliation for taking FMLA leave. The district court ruled for TRS, and Addison appealed to the U.S. Court of Appeals for the 7th Circuit, which covers Illinois, Indiana, and Wisconsin.

What the Court Said

The appeals court affirmed the decision, noting that TRS had documented a decline in Addison's performance at least 3 months before she took FMLA leave and that she was not informed of her potential eligibility for FMLA until several days after her manager met with her to discuss her absences and EFT errors and wrote a memo summarizing the meeting.

According to the court, the ultimate decision maker (i.e., the executive director) was not aware of Addison's FMLA leave and did not rely solely on her manager's recommendation when deciding to terminate her

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Robert L. Brady, J.D., *Publisher*; Margaret A. Carter-Ward, *Editor in Chief*; Susan Schoenfeld, J.D., *Legal Editor*; Todd H. Girshon, Esq., Jackson Lewis, LLP, *Consulting Legal Editor*; Elaine Quayle, *Editor*; Joan Carlson, Linda Costa, Sandra Fisher, Corinne Weber, *Proofreaders*; Agnes D. Franks, *Marketing Manager*; Rebecca MacLachlan, *Graphic Designer*; Sherry Newcomb, *Content Production Specialist*. Contact Customer Service for reprints at 800-727-5257, ext. 2301. *FMLA Policy, Practice & Legal Update* is issued by BUSINESS & LEGAL REPORTS, INC. Editorial and business offices are located at 141 Mill Rock Road East, P.O. Box 6001, Old Saybrook, CT 06475-6001. ©2010 Business & Legal Reports, Inc.

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Ask the EXPERTS

Bonding Leave with Healthy Newborn

Q: An employee of less than a year gave birth during the fall to a healthy child. She was on leave for 6 weeks. Half of that time was covered with accrued sick, vacation, and personal days; the other half of the leave was unpaid. About 2 months ago, the employee became FMLA-eligible. She now wants to take 7 weeks to bond with her healthy baby, 4 weeks of leave now, and another 3 weeks closer to the summer. However, her supervisor wants her to take the entire 7 weeks now in one block of time because he currently has a replacement available who may not be available in the summer. What should we do?

A: It is undisputed that under FMLA Regulation 825.120(a)(2), the employee-mother can take up to 12 weeks of FMLA leave to bond with her healthy newborn as long as the leave is taken within 12 months of the date of the birth of the child. This section of the regulations does not otherwise specifically address the timing of when that leave must be taken, as long as it is within 12 months of the birth. While it would be preferable for the employer to have the employee schedule this bonding leave at a time most convenient for the company, it is arguably FMLA interference if the employer forces the employee to take the 7 weeks now in one block of time in order to accommodate the supervisor's request.

However, since the employee wants to take the leave in two segments, then she is arguably requesting intermittent leave, and that would require the employer's permission because leave taken after the birth of a healthy baby does not qualify for intermittent or reduced leave unless the employer agrees. See 825.202(c).

As a practical matter, the HR manager should discuss the options with the employee so a resolution that works

for both the employee and employer can be achieved.

Ultimately, if the company does not want to grant the bonding leave on an intermittent basis, it will have to grant the employee a block of leave (e.g., either the original 7 weeks, or perhaps as many as 12 weeks) at a time that is acceptable to the employee before the end of the 12-month bonding period.

Individual Liability Under FMLA

Q: Can a supervisor, manager, or Human Resources representative be held individually liable if sued in his or her individual capacity under the FMLA?

A: The answer is generally "yes." However, it depends on whether the supervisor, manager or Human Resources representative satisfies the statutory language of "employer" within the FMLA (see 29 USC Sec. 2611(4)). This section of the Act defines employer to include "... any person who acts directly or indirectly in the interest of an employer to any of the employees of such employer." Note that this definition of employer under FMLA is the same definition of employer as under the Fair Labor Standards Act (29 USC Sec. 203(c)).

The view in a majority of jurisdictions throughout the country is that any manager, supervisor, or Human Resources representative who has authority over employees, such as the power to hire, fire, grant FMLA leave, and discipline, is subject to being sued personally under the FMLA.

However, depending on the jurisdiction in which the employer's representative is being sued individually, there may be case law that supports a minority view that there is no individual liability under FMLA.

Any supervisor, manager, or Human Resources representative who is sued individually should consult with an attorney. The attorney can determine whether the individual can be dismissed from the case before the trial starts.

Jackson Lewis Disability, Leave and Health Management Practice Group

The Jackson Lewis Disability, Leave and Health Management Practice Group is available to assist employers in sorting through the complex legal and compliance issues involving the Americans with Disabilities Act, the Family and Medical Leave Act, and other workplace health management issues. Jackson Lewis is a national law firm that limits its practice to the representation of management in employment, labor, benefits, and immigration law and related litigation.

For more information, please contact Todd Girshon, a partner in Jackson Lewis's New York City office at 212-545-4030. Please visit the firm's website, www.jacksonlewis.com, where you may subscribe to receive free e-mail updates on workplace law developments, or go to <http://myupdates.jacksonlewis.com>.

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California Leave For Emergency Operation Missions

Q: Is an employer in California required to provide an employee with time off from work in order to respond to an emergency operational mission of the Civil Air Patrol (CAP)? If yes, what is required?

A: In California, the answer is now "yes." The Civil Air Patrol Employment Protection Act now requires California employers with 15 or more employees to permit employees who have been employed 90 or more days to take a leave of absence to respond to an emergency operational mission

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Experts (continued from page 3)

of the California Wing of CAP. An eligible employee may take up to 10 days per year.

Leave is limited to 3 days on any one occasion, but can be extended if authorized by the government entity that called for the mission and the employer agrees. Unless the employer voluntarily elects to pay for the time off, CAP leave is unpaid. However, an employee cannot be required to substitute paid time off, such as vacation, and sick leave, for the unpaid leave.

Employees who take CAP leave must be reinstated to the same position they had prior to commencing leave with the equivalent seniority status, benefits, pay, and other terms and conditions of employment, unless the employer can prove the failure to do so was unrelated to the leave. Employers may not discriminate against or terminate employees who are members of CAP because of such membership. Nor may an employer interfere with, restrain or deny an employee's attempt to exercise a right established by the Act. Employers should ensure that managers,

supervisors, and human resources personnel responsible for administering leaves of absence are aware of these new legal requirements. In addition, employers may wish to update their employee handbooks for California employees to reflect this new leave requirement.

Other states, such as Colorado, Illinois, Indiana, and Tennessee, also have leave protection laws for employees who serve in those states' CAP. Employers in those states should check state law before administering an employee's leave request to serve in CAP.

Case Study (continued from page 2)

employment. Instead, the executive director also considered input from the benefits manager and the HR director, who had done her own investigation and who also recommended termination.

Addison claimed that TRS failed to follow its own internal discipline procedures, but the court noted that she received several warnings before termination and that company policy allows management "to begin disciplinary action at any step" and

that "[f]or certain major violations or continued failure to respond to prior disciplinary action, discharge may be the only recourse."

Long v. Teachers' Retirement System of the State of Illinois (No. 08-3094) (U.S. Court of Appeals, 7th Cir., 10/23/09)

In Brief

- **Train on disciplinary procedures.** Managers cannot follow disciplinary procedures if they are not familiar with them.

- **Stress the importance of documentation.** Managers and supervisors need to not only address performance issues, but also document their efforts to rectify problems.
- **Provide an overview of the law.** Supervisors do not need to be experts on the FMLA, but they do need to understand the basics of the law, including the fact that employers are prohibited from discriminating against employees who take FMLA leave.

FMLA Leave Update

Retroactive FMLA Leave Designation: Proceed with Caution!

If an employer fails to tell an employee that leave has been designated as FMLA leave, can the employer count the leave against the employee's FMLA leave entitlement?

The new FMLA regulations reflect a change in DOL's position. The designation provisions now comply with the U.S. Supreme Court's decision in *Ragsdale v. Wolverine World Wide, Inc.* (535 U.S. 81 (2002)). *Ragsdale* ruled that a "categorical" penalty for failure to appropriately designate FMLA leave was inconsistent with the statutory entitlement to only 12 weeks of FMLA leave and contrary to the statute's remedial requirement to demonstrate individual harm.

Under the new FMLA regulations, retroactive designation is permitted if an employer fails to timely designate leave as FMLA leave (and notify the employee of the designation). The employer may be liable; however, if the employee can show that he or she has suffered harm or injury as a result of the failure to timely designate the leave as FMLA. Additionally, an employee and employer may agree to retroactively designate an absence as FMLA-protected.

Examples Highlight FMLA Leave for a Family Member

In its FMLA FAQs, DOL provides the following example of whether retroactive designation of FMLA leave would be allowed:

Henry plans to take 12 weeks of FMLA leave beginning in August for the birth of his second child. However, earlier in the leave year, Henry took 2 weeks of annual leave to care for his mother following her hospitalization for a serious health condition. Henry's employer failed to notify him at the time of his mother's hospitalization that the time he spent caring for his mother would be counted as FMLA leave. If Henry can establish that he would have made other arrangements for the care of his mother if he had known that the time would be counted against his FMLA entitlement, the 2 weeks his employer failed to appropriately designate may not count against his FMLA entitlement.

The FMLA regulations also address the issue of how retroactive designation could cause "harm or injury" to an employee. Specifically, the regulations state:

"If an employer that was put on notice that an employee needed FMLA

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STATEWATCH

ARKANSAS

Breaks for Breastfeeding

State law requires employers to provide reasonable unpaid break time each day to an employee who needs to express breast milk for her child in order to maintain her milk supply and comfort. To the extent possible, the break time must run concurrently with any paid or unpaid break time already provided to the employee. An employer is not required to provide break time if to do so would create an undue hardship on the employer's operations. The employee must make reasonable efforts to minimize disruption to the employer's operations.

An employer must make a reasonable effort to provide a private, secure, and sanitary room or other location in close proximity to the work area, other than a toilet stall, where an employee can express her breast milk. The room or location provided may include the employee's normal work space, if the employee's normal work space meets the requirements discussed above (AR Code Sec. 11-5-116).

COLORADO

School and Civil Air Patrol

The **Parental Involvement in K-12 Education Act** requires all employers covered by the federal FMLA to grant employees up to 6 hours' unpaid per-month leave, not to exceed 18 hours in any academic year, for the purpose of attending an academic activity for or with the employee's child (CO Rev. Stat. Sec. 8-13.3-102 *et seq.*).

In the alternative, an employer and employee may agree to an arrangement allowing the employee to take paid leave to attend an academic activity and to work the amount of hours of paid leave taken within the same workweek. An employee who works less than a full-time schedule is eligible for a portion of the parental leave, based on the percent of a full-time schedule the employee works.

A private employer may not discriminate against or discharge any member of the Civil Air Patrol because of his or her membership in the Civil Air Patrol. The employer may not hinder or prevent a member from performing during any Civil Air Patrol mission for which a member is entitled to leave. All private employers are covered by this law, regardless of size (CO Rev. Stat. Sec. 28-1-102).

Employees are entitled to up to 15 days of unpaid leave per calendar year to serve in the Civil Air Patrol.

HAWAII

Employer Notice

At least once a year, employers must provide written notice to each of its employees informing the employees of their rights under the **Hawaii Family Leave Law**, particularly with respect to caring for a seriously ill family member. Employers must also provide information relating to possible adverse impacts that the taking of family leave may have on any other employee rights, entitlements, or benefits provided by the employer or required by law.

ILLINOIS

Leave for Platelet And Blood Donation

Local government and private sector full-time employees who work for organizations with 51 or more employees are permitted to take 1 hour or more of paid leave, or more if authorized by the employer or a collective bargaining agreement, every 56 days to donate blood. In order to take leave to donate blood, the employee must have been employed for 6 months or more and must first obtain approval from his or her employer.

Employees may take 2 hours or more to donate blood platelets. Leave for platelet donation may not be granted more than 24 times in a 12-month period.

NEVADA

Time Off for School Activities

Employers with 50 or more employees must allow an employee who is a parent, guardian, or custodian of a child enrolled in a private or public school up to 4 hours of unpaid leave per school year, per child, to attend certain school-related activities or events or to volunteer at the school in which the child is enrolled. Leave must be taken in increments of 1 hour.

Covered school-related events are broadly defined, including:

- Attending parent-teacher conferences,
- Attending school-related activities during regular school hours,
- Volunteering or otherwise being involved at the school in which the child is enrolled during regular school hours, *and*
- Attending school-sponsored events.

The leave must be taken at a mutually agreed upon time, and the employer may require employees to submit a request for leave in writing 5 school days before the date the leave is taken.

Employers are prohibited from demoting, suspending, or otherwise discriminating against a parent, guardian, or custodian of a child who takes leave (NV Rev. Stat. Sec. 392.920).

WASHINGTON

Breastfeeding Rights

The state antidiscrimination statute protects a mother's right to breastfeed her child in any place of "public resort, accommodation, assemblage, or amusement" and makes it unlawful to discriminate against a woman based on her status as a mother breastfeeding her child (WA Rev. Code Sec. 49.60.030).

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However, the White House proposal would not make the credit refundable, so families with little or no federal tax liability would receive little or no benefit. For example, a single mother with two children earning \$30,000 would not be able to take advantage of the proposed improvements; and, in many states, she also would not be eligible for childcare assistance through CCDBG.

For more information on CCDBG, go to: <http://www.acf.hhs.gov/programs/ccb/ccdf/factsheet.htm>. For more information on the Child and Dependent Care Tax Credit, go to <http://www.irs.gov/taxtopics/tc602.html>

Inventive Paid Leave Initiative

In a twist on the more generalized paid leave proposals considered by Congress in 2009, Senator Chris Dodd (D-CT) and Congresswoman Rosa DeLauro (D-CT-3) recently introduced emergency legislation that will guarantee paid sick days for those who are infected by the H1N1 virus.

The legislation includes the following provisions:

- Workers will be able to earn up to 7 job-protected paid sick days to use for leave due to their own flu-like symptoms, medical diagnosis, or preventive care; to care for a sick child; or to care for a child whose school or childcare facility has been closed due to the spread of contagious illnesses, including H1N1.
- Discretion on the need for sick leave would be left to the employee, although medical certification could be required through regulation by DOL.
- The bill would sunset after 2 years.

At a hearing of the Health, Education, Labor, and Pensions (HELP) Subcommittee on Children and Families in response to the H1N1 pandemic, Dodd stated that “H1N1 flu is a public health emergency—and slowing the spread of the disease must be one of our top priorities. This bill will allow individuals with the H1N1 flu to follow the recommendations of the CDC and stay home instead of coming to work while sick, and will

also make it easier for parents to care for children who must stay home due to the flu or school and childcare closings.”

“The emergency legislation allows workers to decide when they are too sick to work—and are healthy enough to return to work. Our legislation will provide real worker protections and also ensures that working parents can take paid sick leave if their child is sick and needs care,” DeLauro stated at the same hearing.

Dodd is the chairman of the Health, Education, Labor, and Pensions (HELP) Subcommittee on Children and Families and the lead sponsor of the Healthy Families Act. Dodd joined Senator Edward Kennedy in introducing the Healthy Families Act earlier in 2009, which allows workers to earn up to 7 paid sick days per year guaranteed.

DeLauro is the lead sponsor of the same legislation in the House of Representatives.

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leave failed to designate the leave properly, but the employee’s own serious health condition prevented him or her from returning to work during that time period, regardless of the designation, an employee may not be able to show that the employee suffered harm as a result of the employer’s actions.

However, if an employee took leave to provide care for a son or daughter with a serious health condition believing it would not count toward his or her FMLA entitlement, and the employee planned to later use that FMLA leave to provide care for a spouse who would need assistance when recovering from surgery planned for a later date, the employee may be able to show that harm has occurred as a result of the employer’s failure to designate properly. The employee might establish this by showing that he or she would have arranged for an alternative caregiver for the seriously ill son or daughter if the leave had been designated timely” (29 CFR 825.301).

Follow the FMLA Designation Rules

So, it would appear that the “harm or injury” provision is most commonly applicable in situations where the employee is caring for a covered family member, rather than for his or her own serious health condition. As a result, employers should be especially cautious when considering leave requests to care for seriously ill family members and follow the specific rules and timetables for FMLA leave designation.

Those rules are:

- An employer must notify an employee whether leave will be designated as FMLA leave *within 5 business days* of learning that the leave is being taken for a FMLA-qualifying reason, absent extenuating circumstances.
- The designation notice must also state whether paid leave will be substituted for unpaid FMLA leave and whether the employer will

require the employee to provide a fitness-for-duty certification to return to work (unless a handbook or other written document clearly provides that such certification will be required in specific circumstances, in which case the employer may provide oral notice of this requirement).

- If the amount of leave needed is known, an employer must inform an employee of the number of hours, days, or weeks that will be counted against the employee’s FMLA leave entitlement in the designation notice. Where it is not possible to provide the number of hours, days, or weeks that will be counted as FMLA leave in the designation notice (e.g., where the leave will be unscheduled), an employer must provide this information upon request by the employee, but *no more often than every 30 days* and only if leave was taken during that period.

New IRS Guidance

New IRS Guidance: Pay and Benefits During Military Leave

Although the number of military service members called to active duty has decreased somewhat, many American men and women in the National Guard and reserves continue to receive the call to duty. In an effort to alleviate the economic and other stresses of military service, the FMLA has been amended to allow for leave for qualifying exigencies and caring for family service-members.

In addition, the Heroes Earnings Assistance and Relief Tax Act of 2008 (HEART Act) amended the federal tax code to allow employers to administer differential compensation and benefits issues, and to reward some employers for providing pay to employees who serve.

After the passage of the HEART Act, questions remained regarding the tax implications of the pay and benefits for employees serving in the military. In response, the Internal Revenue Service (IRS) recently issued Notice 2010-15 (the Notice) in Q&A-style form to clarify the initial legislation. The Notice provides guidance in the form of questions and answers with particular respect to the following sections of the Heart Act:

- *Section 104*—relating to survivor and disability payments with respect to qualified military service
- *Section 105*—relating to treatment of differential military pay as wages
- *Section 107*—relating to distributions from retirement plans to individuals called to active duty
- *Section 109*—relating to contributions of military death gratuities to Roth IRAs and Coverdell education savings accounts
- *Section 111*—relating to an employer credit for differential wage payments to employees who are active duty members of the uniformed services

Some of the information in the Notice is provided below. For more information and to see IRS Notice 2010-15, go to <http://www.irs.gov/pub/irs-drop/n-10-15.pdf>.

Differential Pay

When employees in the National Guard or reserves are called to active duty, some employers choose to pay some or all of the compensation that a service-member would have received from the employer during the service member's period of active duty had the employee not been called to active duty.

Prior to the HEART Act, these payments, commonly referred to as "differential wage payments," were not treated as wages for federal employment tax purposes, pursuant to IRS Rev. Rul. 69-136, 1969-1 C.B. 252.

Section 105(a) of the HEART Act amended § 3401 of the tax code to treat differential wage payments as wages for income tax withholding purposes. The term "differential wage payment" is defined in §3401(h) as any payment that:

- (1) Is made by an employer to an individual with respect to any period during which the individual is performing service in the uniformed services while on active duty for a period of more than 30 days, *and*
- (2) Represents all or a portion of the wages the individual would have received from the employer if the individual were performing service for the employer.

Important: Differential wage payments made to an individual while on active duty in the U.S. uniformed services for more than 30 days are subject to income tax withholding, but are not subject to FICA or FUTA taxes. For more information on the tax treatment of differential wage payments during military service, see IRS Rev. Rul. 2009-11.

Tax Credit for Employers

The HEART Act also provides a tax credit for eligible small business employers that make eligible differential wage payments to employees while serving in the military in the National Guard or reserve forces. The credit is equal to 20 percent of the sum of the eligible differential wage payment paid to each

qualified employee during the taxable year (IRC Sec. 45P).

An "eligible small business employer" for a taxable year is an employer that employed an average of fewer than 50 employees on business days during the taxable year and made eligible differential wage payments under a written plan to every qualified employee of the employer. No credit is allowed if an employer violates the employment or reemployment rights of a reservist who has been called to active duty.

A "qualified employee" is a person who was employed by the employer claiming the credit for the 91-day period immediately preceding the period for which any differential wage payment is made.

Benefits

In addition to questions regarding withholding and tax credits, employers questioned the effect of the HEART Act on benefits such as death or disability while performing military service, distributions for qualified retirement plans, plan amendments, and other issues surrounding retirement.

In response, the IRS Notice 2010-15 provides examples of the types of benefits to which survivors could be entitled under the Act. Most notably, the Notice clarifies that:

- Survivors are entitled to any accelerated vesting or ancillary life insurance benefit provided under the Plan.
- The Act applies to any benefit due to a survivor that is contingent on the participant's death.
- When an employer pays differential wage payment, the amounts paid are treated as compensation for purposes of qualified retirement plans. However, employers are *not required* to treat differential wage payments as compensation in determining a participant's benefit under a Plan.
- If a qualified retirement plan participant is called to active duty for 31 days or more, he or she is entitled to take a distribution from the plan which is not subject to the 10 percent early withdrawal tax. An employer that chooses to provide for this special distribution must impose a 6-month restriction on elective deferrals or other employee contributions for any participant who takes such a distribution.

Compliance

Clip & Save

FMLA Policy Points

Your FMLA policy should include:

- Statement regarding the way in which requests should be made and to whom they should be made.
- Notice that FMLA leave is limited to 12 weeks, in a 12-month period (or 26 weeks for families of servicemembers with military-related injuries).
- Requirement that employees work 12 months or 1,250 hours in a year to be eligible. Note that employment need not be continuous. Under revised FMLA regulations, a break in service can be as long as 7 years and even longer if employee's break in service was caused by fulfillment of his or her National Guard or reserve military leave *or* a written agreement such as a collective-bargaining agreement that allows for breaks of service greater than 7 years.
- Indication that intermittent leave is permissible as long as management is reasonably notified.
- Latitude to transfer an employee on reduced or intermittent leave to an equivalently paid spot in the organization where FMLA leave is less disruptive to operations.
- A ban on discrimination in granting FMLA leaves.
- Requirements for medical certification, any reports that must be filed when on leave, and any fitness-for-duty certification that must be supplied before returning to work.
- Rules on who pays for the employee's continued healthcare and/or benefits coverage while on leave.
- Employee's right to require (or right to decide) that they use up paid time off, such as sick or vacation days, before FMLA leave begins to be counted.
- Employee's right to return to the job left, or one equivalent to it (with one exception, noted below), as long as all policy conditions are met.
- Notice of the "key employee" provision in the law that allows an employer to deny reemployment of certain highly paid employees whose presence is deemed crucial to the company, provided they are told they run this risk when they ask for FMLA and that the decision on whether to reemploy them is not made until the end of the leave.
- Statement regarding what employer will do when an employee fails to return from leave on the specified date.
- Statement that company will maintain records of family leaves in accordance with applicable law.