

Employment Advisor

New FMLA Regulations Effective January 2009

New Family and Medical Leave Act (FMLA) regulations interpret the new military family leave entitlements and update the existing regulations under the FMLA. Since 1993, the FMLA has allowed employees to use up to 12 weeks of leave per year to care for a new child or sick relative, or to recover from their own serious health conditions.

Two new categories of leave for military families were added to the FMLA in January 2008. Covered Servicemember Family Leave simply extends from 12 to 26 weeks the amount of FMLA leave available to an eligible employee seeking time off to care for an ill or injured relative when the relative incurred their serious health condition in the line of active duty. The scope of covered relatives for this purpose also increases to include "next of kin."

Qualifying Exigency Leave, which now takes effect with the new regulations, permits eligible

employees to take up to 12 weeks of FMLA leave to handle exigencies related to a family member's active duty military service or call to active duty. Under the new regulations, an eligible employee may take leave for one or more of the following "qualifying exigencies": (1) short notice deployment (2) military events and related activities (3) childcare and school activities (4) financial and legal arrangements (5) counseling (6) rest and recuperation (7) post-deployment activities and (8) other activities that are agreed on by the employer and employee.

The new regulations also clarify or change other obligations, and provide revised forms. Listed below are the major impacts the new regulations will have on employers.

Notice of FMLA Rights: Employers must give new hires notice of the FMLA policy. If
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Battles Rage Over Confusing Military Leave Statutes

Most employers have employees who are members of Reserve (federal) or National Guard (state) military units. Many of these employees have been called to active duty and are on military leaves of absence from their employment. Increasingly, employees and unions are making demands for pay and other benefits while on leave. These claims must be evaluated in the context of myriad federal and state laws. In our experience there has been a wide range of employer practices and interpretations when it comes to this complex and emotion-laden area of the law.

Federal Law. The Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. 4301-4334 ("USERRA") protects the rights of employees who leave their employers to perform military service.

USERRA protects employees from discrimination based upon their voluntary or involuntary participation in National Guard or Reserve units. Employees called to serve in the military, whether for training or for longer periods of active duty in connection with a state or national emergency, must be allowed to take leave in order to meet their service obligations. Such leave may be unpaid; however, employees are entitled, but not required, to use accrued vacation leave to continue their pay.

USERRA also protects certain benefits of employees while they are away with the military. Employees on military leave are entitled to continuation of their health

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SPEAKING ENGAGEMENTS

☞ *On January 23, 2009, Phil Collins is presenting the Personnel and Labor Agency Decisions Update at the Mass. Municipal Association's Annual Meeting.*

During 2008:

☞ *Laurie Engdahl spoke to human resource professionals at an MMPA seminar on Managing Leave and Absence Issues in the Workplace.*

☞ *Kevin Feeley presented an overview of the health insurance law, c. 32B, to the Massachusetts Collectors and Treasurers Association.*

☞ *Dan Brown also spoke to the Collectors and Treasurers Association on Municipal Trust Funds.*

☞ *Phil Collins presented "Ripped from the Headlines: Is Abuse of Sick Leave a Crime?" at the MMPA's annual labor relations seminar.*

Chicken Little: Sky is Falling Also, Cops to Smoke Joints In Cruisers

New Marijuana Law Hazy On Employee Discipline For Non-Criminal Possession

Could the law that took effect January 2, 2009, decriminalizing possession of an ounce or less of marijuana, erase drug free workplace policies and prevent the discipline of employees – even police officers – caught with the drug? Under “An Act Establishing A Sensible State Marijuana Policy,” enacted as the result of a ballot question, the possession of an ounce or less is still illegal, but it is now “only” a civil offense, subject to a fine. But, some are suggesting that a provision of the law will tie the hands of employers when it comes to discipline.

That provision states that “neither the Commonwealth nor any of its political subdivisions or their respective agencies, authorities or instrumentalities may impose any form of penalty, sanction or disqualification on an offender for possessing an ounce or less of marijuana” unless there is a specific exception in the Act. The statute goes on to list “by way of illustration but not limitation” several examples of when an offender cannot be penalized for the offense. It says that there can be no denial of: student financial aid, public housing or any form of public financial assistance, including unemployment benefits, the right to drive and the right to serve as a foster or adoptive parent. And, the offense cannot be included in criminal offender record information (“CORI”).

If there is no legislative clarification, the issue could be litigated in the context of an employee discipline case. It is also likely to become an issue if an applicant for employment or promotion based on marijuana use after the effective date of the law. Management will argue that

it would expand the statute far beyond its intended reach to interpret it to prevent an employer from enforcing anti-drug policies. In selling the new law to the voters, there was never any mention that it would free public employees from any consequences associated with the possession or use of less than an ounce of marijuana. Management should emphasize that “penalty” clause quoted above does not refer to employee discipline, including in the illustrative examples.

The Executive Office of Public Safety and Security agrees that the law does not prevent the discipline of police officers who possess an ounce or less of the drug. EOPS’s view is that the statute was intended to eliminate the criminal conviction and criminal record that previously resulted from the offense and the ancillary consequences that flowed from a “conviction.” It goes on to say, “Accordingly, Question 2’s preclusion on the imposition of other forms of ‘penalty, sanction or disqualification’ for possessing an ounce or less of marijuana is most appropriately read as intending to bar penalties of the type that would previously have resulted from a criminal conviction, not to prohibit workplace discipline that has historically been wholly separate and distinct from the criminal process.”

Employers do not always separate employee discipline from the criminal process even though the better approach is to do so because of the delay and uncertain results so characteristic of criminal prosecutions. Rather than rely on a criminal conviction, the better course is to investigate the underlying conduct and act based on a violation of a condition of employment, including a standard of conduct, workplace policy, rule or regulation. It is relatively easy to justify discipline for a police officer or any

other type of employee – firefighter, teacher, DPW laborer, administrative assistant – caught with marijuana at work. Discipline for after hours use or possession has always been dependent on the type of employment involved and the connection between the off-duty conduct and the workplace. Courts and other sources of authority recognize and hold police officers to a higher standard of off-duty conduct as compared with most other employees. The law has not changed this, even when it comes to personal use of marijuana, which is still illegal.

The statute is not at all ambiguous about marijuana offenses other than possession of an ounce or less. By its express terms, it does not “modify existing laws, ordinances or bylaws, regulations, personnel practices or policies concerning the operation of motor vehicles or other actions taken while under the influence of marijuana...” Likewise, there has been no change in the laws prohibiting distributing, selling, manufacturing and possessing more than an ounce of marijuana. The statute also expressly allows cities and towns to enact ordinances and bylaws prohibiting and punishing the consumption of marijuana in public places. There is also a legitimate argument that smoking marijuana – on or off-duty – would violate the health-based statute prohibiting smoking by police officers and firefighters.

Before reacting to this enactment by taking any action that could signal a dangerous reduction in standards of conduct for employees, be sure to consult counsel to determine if such a change is legally required.Ω

Handbook Benefits Vest Despite Later Changes

Don't assume that you can unilaterally change benefits in an employee handbook and not have to pay at-will employees who have worked under a more generous provision. In *Lemaitre v. Massachusetts Turnpike Authority*, 452 Mass. 753 (Dec. 2008), the Supreme Judicial Court held the MTA liable for a more generous sick leave buyback payment to a retiree who had accumulated the sick leave under the old provision, even though the buyback benefit was reduced for his last six years of employment. The decision takes one step beyond previous employee handbook decisions in which the SJC has enforced procedural protections, such as grievance and dismissal provisions.

Lemaitre worked for 17 years under a provision which encouraged employees not to use their sick leave by applying half of the dollar value of the unused sick time to their retirement health insurance premiums, and giving them the other half in a cash payment. Six years before Lemaitre retired, the handbook was changed to drastically reduce the benefit to a cash payment of 20% of the dollar value of the accumulated sick leave. When Lemaitre retired, the MTA used the reduced benefit to calculate what it owed him for all of his sick leave, including the days he had accumulated *before* the benefit was unilaterally reduced.

The Court found that the buyback was a form of compensation based on continued employment and services rendered while the program was in place. As the Court put it, "...the authority bound itself to paying the benefits it promised for the performance it sought and secured." In short, Lemaitre had earned payment under the more generous formula for those days accrued during his 17 years under that formula. He claims to have been shorted \$80,000 and the case was remanded to determine damages.Ω

New FMLA Regs

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an employee handbook is provided, the notice requirement can be met by placing the information in the handbook. Display of a poster remains a requirement under the new regulations.

Five Days to React When Leave is Needed. The new regulations require employers to send off various forms and notices to employees within five days of learning that an employee may need leave. The good news is that this is an increase from the two days provided under the old regulations. In addition, the process is better defined and the DOL provides the needed forms on its website. (See <http://www.dol.gov/esa/whd/fmla/>). The regulations also explicitly recognize retroactive designation of FMLA leave as long as it does not harm the employee's rights.

New Medical Certification Forms: As part of the new regulations, the DOL has created several new medical certification forms, one for use in considering an employee's own serious health condition and another for use when an employee requests leave to care for a family member with a serious health condition.

Notification of Certification Deficiencies: The final regulations require employers to notify employees in writing if the employer determines that a medical certification is incomplete or insufficient. The employer must state in writing what additional information is necessary and give the employee seven days to cure the deficiency. If an employee does not cure the deficiency, the employer may deny FMLA leave. Most employers probably did this anyway when certification was deficient, but the process is now more clearly defined.

Contacting Employee's Doctor: The new regulations provide that an employer may contact an employee's health care provider to clarify or authenticate the medical certification if the employee has not cured deficiencies in the certification. The employer must use a health care provider, human resources professional, leave administrator or management official to make that contact, but *not* the employee's direct supervisor. Employers may not ask health care providers for additional information beyond that required by the certification. Communication with the health care provider may require the employee to provide authorization compliant with the Health Insurance Portability and Accountability Act (HIPAA), but if the employee refuses to provide the employer with authorization and does not otherwise clarify the certification, the employer may deny the FMLA leave.

Prior Employment Counts for Eligibility: The new regulations expand eligibility by extending the requirement of 12 months of employment to include time worked before a break in service of less than seven years. (If the break in service was due to military service, the employer must count prior employment periods preceding a break in service of more than seven years). This does not affect the requirement that the employee provide at least 1250 hours of service within the preceding 12 months, however.

Employee Notice Requirements: Under the new regulations, an employee needing FMLA leave must follow the employer's usual and customary call-in procedures for reporting an absence, closing an apparent loophole in the previous regulations.

Although there are a number of changes to the FMLA regulations, sophisticated employers will not change their approach to FMLA leave very much. It is important to download and use the new forms, and ensure that an FMLA notice of rights or an FMLA policy is included in the packet of materials you give to newly hired employees. Take a more deliberate approach to requests for FMLA leave in the weeks ahead, consulting counsel as needed to ensure that your procedures continue to hold up under the new regulations. Look for more guidance on our website, <http://www.collinslabor.com/>.Ω

Military Leave Guidance

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insurance for the first 30 days of their leave. Thereafter, the employer must make available to the employee group health insurance, provided that the employee pays the full premium for the coverage (this coverage is similar to COBRA, and the employer may also charge a 2% administrative fee if it elects to do so). An active duty military member and his/her family also receive benefits from the U.S. Government.

One of the main benefits of USERRA is the service member's right to be reemployed upon return from active duty. Depending upon the length of service, the employee has a certain number of days to report back to the employer after being discharged from active duty. Employees with a punitive or unfavorable discharge are not entitled to reemployment rights, but the rest are entitled to reemployment with all seniority that they would have accrued had they not gone on active military service.

Returning employees' rights to benefits missed while on military leave are governed by the "escalator" principle. Any step increases, or job upgrades that they would have received during their period of military service, must be accorded to the returning employees, even if this requires some additional training. An employee returning from leave is not required to be promoted to a higher position if all similarly situated employees were not promoted. However, the employer may be required, depending upon the circumstances, to allow the employee to take a make-up promotional examination if such an examination was missed due to military service.

The returning employee's ability to get back his or her seniority also applies to retirement credits. Time served in the military counts towards retirement, and to the extent retirement contributions by employer and

employee are required, those contributions must be made up within a set period of time after the employee returns.

State Law. Reserve and National Guard members who are on military leave from their state and municipal jobs are also protected by state law. Pursuant to 10 U.S.C. § 261, the state National Guard is a reserve component of the armed forces of the United States, and can be called to federal active duty by the President. The National Guard can also be ordered to duty by the Governor pursuant to certain statutory sections in G.L. c. 33. For the most part, National Guard members are activated for full-time service when they are needed for federal missions. When this happens, the missions are paid for with federal funds pursuant to 32 U.S.C. §§ 502 or 503.

G.L. c. 33, § 59 [Effect of military service on salary or vacation allowance of public employees], governs the effect military service has on a municipal employee's compensation. It is a local acceptance statute, so it is important to verify whether it has been adopted in a given municipality. The statute provides that municipal employees who are on leave to participate in their annual National Guard or Reserve training must be paid by their municipality for the time served, up to 17 days annually. In *Glass v. City of Lynn*, 49 Mass. App. Ct. 352 (2000), plaintiff police officers claimed entitlement to all 17 days of municipal pay while they were serving their annual tours of duty. The Court held that the officers were only entitled to pay for the regularly scheduled workdays occurring during the first seventeen *calendar* days of their military leave.

One question that frequently arises about the statute is why, in addition to the language regarding 17 days, there is also a reference to 34 days. The answer is that the statute was amended to insert the 34 day period in order to protect National Guard or Reserve members who perform two 17-day annual tours within the same state fiscal year, which is different from the federal fiscal year.

Employers should simply remember that for each annual training tour, an employee is entitled to be paid for regularly scheduled workdays during the first 17 calendar days of the training leave.

In addition to annual training (which usually lasts about two weeks), the statute lists other types of leave which qualify for compensation under the statute. These other types of leave are when the Governor activates the National Guard for certain types of duty, such as emergency assistance to local officials.

In regard to compensation, the statute states that employees on qualifying military leave are entitled, "...to receive pay therefor, without loss of his ordinary remuneration as an employee...of the...city or town..." While there is no Massachusetts case law on what "without loss of ordinary remuneration" means, other states have interpreted it to mean that the employee is entitled to his/her full municipal pay in addition to military pay.

This 'double pay' provision does not seem too onerous considering that it may come into play only for approximately two weeks of training per year and an occasional short-term emergency. However, at least one union has initiated litigation attempting to receive double pay for one of its members for an entire year of military leave. The leave was ordered by the Governor, but was paid for with federal funds and was in support of a federal mission (even though the employee never left the state during the activation). Rather than pure state service (think Blizzard of '78), or pure federal service (activated by the President under federal law to serve overseas), this leave is a type of hybrid service which is increasingly being ordered. The claim for double pay under G.L. c. 33, § 59 has some support in a 1977 Attorney General opinion.

One factor weighing against the interpretation that one could receive dou-

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Military Leave

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ble pay for the hybrid state-side service is the fact that the legislature enacted Chapter 137 of the Acts of 2003 [An Act Relative To Public Employees Serving In The Armed Forces Of The United States]. This local-acceptance statute provides that municipalities pay only the difference between military pay and municipal pay for National Guard or Reserve members serving in a federal activation, overseas in combat theatres. It is unlikely that the legislature intended for municipalities to pay the difference in salary to National Guard members who are in combat, while providing double pay for those who stay in Massachusetts in support of the federal mission.

Originally, the formula used in Chapter 137 of 2003 to determine how much pay was owed to employees included all military allowances (which are substantial when including items such as housing) thus, in most instances, employees received little, if any municipal pay. In 2005, the statute was amended to make the calculation more favorable to employees by including only base military pay. It is important to note that the statute includes provisions for retroactive payments. If the statute is adopted, then any qualifying leaves back to September 11, 2001, must be appropriately compensated. The retroactive payment provision expired in 2005 and the statute itself was scheduled to expire in September, 2008. There is currently draft legislation which, if passed, will remove all expiration dates, rather than simply extend them. The impact of the deadline for expiration having passed is unknown, but for now, it appears that the statute is inoperative.

Military leave statutes also impose requirements around health insurance benefits. While the military provides direct medical care to members and dependents and makes health insurance available, many times employees with families would rather keep

coverage through their employers. USERRA requires employers to make these benefits available under similar terms as those provided for former employees under COBRA. Some employers opt to allow employees to continue to pay only the employee contribution to maintain insurance.

If public employers wish to continue health insurance for employees on military leave (with the employees contributing their usual percentage), the municipality must adopt G.L. c. 32B, § 9I. Municipalities that are continuing health insurance coverage for these employees should check to make sure they have adopted § 9I. We have found that many municipalities have continued health insurance coverage for the employees under policies issued by their legislative bodies, without knowing whether §9I was ever accepted.

Finally, a relatively unknown law, Chapter 708 of the Acts of 1941, protects civil service employees on leave for military service. For instance, if a candidate for original appointment appears on a certified list but is unavailable due to military service, the appointing authority cannot bypass the candidate based in any way on his military status. The law provides that in such a case, a military substitute may be appointed, who holds the status of a temporary employee, until the candidate returns from military service. This obviously is not practical in many cases, and many municipalities opt to simply keep an opening vacant until the service member returns. The bottom line is that before any civil service action is taken which might affect an employee (or potential employee) who is away in the military, labor counsel and the Commonwealth's Human Resources Division should be contacted.

Military leave for public employees in Massachusetts is a complex issue and is filled with pitfalls, especially for the municipal employer. Employers should seek advice from labor counsel when faced with any uncertainty about a military leave question. In such a circumstance, an ounce of prevention might just be worth a pound of cure.Ω

Attorney-Client Privilege Trumps Public Records Law

A question that is frequently raised by municipal employers is whether their written communications with counsel (such as emails) could be subject to disclosure under the state's public records law. Employers can rest easy: an SJC decision from 2007 ruled that the attorney-client privilege applies to such communications. *Suffolk Construction Co., Inc. v. Division of Capital Asset Management*, 449 Mass. 444 (2007).

The Court explained that even though the public records statute does not specifically exempt attorney-client communications, the privilege applies by virtue of common law. The Court reasoned that the attorney-client privilege encourages and facilitates free and open communications between attorneys and their clients. The Court cited precedent from the nineteenth century for the proposition that the privilege is "vital to the effective administration of justice."

The attorney-client privilege is broad and applies to all communications between attorney and client whenever any sort of legal advice is being discussed. Employers should be able to discuss important matters with counsel in a frank and open manner, whether those discussions take place over the phone, via e-mail, or by any other means. Employers can be assured that their confidential communications will *stay* confidential.Ω

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We're Not Making This Up...

Calling Supervisor a 'Liar' is Protected Activity?

At a hearing over a written reprimand for insubordination, the employee, during the supervisor's testimony, put her head in her hands, and exclaimed in a tone of exasperation and disbelief, "Liar," or "Oh my God, what a liar." The supervisor asked the employee whether she had just called him a liar and she responded, "Yes, you're lying," or "Yes, you're a liar," or words to that effect. The employer attempted to impose discipline for disrespect to a commanding officer – since the employer was a paramilitary organization (corrections). The union filed an unfair labor practice charge.

Held: in favor of the Union, finding that the employee acted impulsively. The Labor Board held that reasonable employees could be chilled from filing and processing grievances due to apprehensiveness over receiving discipline for lawful remarks made during grievance hearings. *Bristol County Sheriff's Department and Massachusetts Corrections Officers Federated Union*, 33 MLC 107 (2007). That raises impulsiveness to an unprecedented legal status.Ω

Quiz Question...

Employer provides optional CPR training to employees. A deaf employee wishes to participate in CPR training and requests a sign language interpreter at employer expense. Must the employer comply?

Policies We Don't Recommend

Loram Maintenance of Way, Inc. had a tradition of wrestling employees to the ground and spanking them on their birthdays. However, one year an employee was spanked with a two-by-four, sending him to the emergency room with injuries. The employee sued his employer. The Minnesota Supreme Court held he was limited to a workers' compensation claim and individual suits against the employees involved. The employer was not responsible because the company had no intent to injure the employee, even if it had been aware of the horseplay.Ω

...Quiz Answer:

Yes. Even though the training is optional, it is a benefit offered to all employees. The sign language interpreter would be considered a reasonable accommodation. (EEOC Enforcement Guidance, www.eeoc.gov).Ω