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CLIENT ADVISORY

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FMLA Update: Is Protected Leave Available to Care for Adult "Children?"

Earlier this year, the U.S. Department of Labor issued an Administrator's Interpretation (No. 2013-1) clarifying when an employee may take protected leave under the Family and Medical Leave Act (FMLA) to care for an adult child.

The FMLA

Enacted in 1993, the FMLA guarantees 12 workweeks of job-protected leave for eligible employees of all public agencies and private sector employers with 50 or more employees. To be eligible for FMLA protection, an employee must have worked for an employer covered by the Act for at least 12 months, have worked 1,250 hours during the 12 month period prior to the commencement of the leave, and work at a location with 50 or more employees in a 75-mile radius.

Leave entitlements under the FMLA include up to 12 workweeks of leave in a 12-month period for any one or more of the following:

- The birth or care of the employee's newborn child;
- The placement of a son or daughter with the employee for adoption or foster care;
- To care for the employee's spouse, son, daughter, or parent with a serious health condition;
- Because of the employee's own serious health condition making him unable to perform his job functions; or
- Because of certain qualifying exigencies arising from the military service of the employee's spouse, son, daughter or parent.
- Also, up to 26 workweeks of FMLA leave is available for military caregivers.

An employee is entitled to protected leave to care for a son or daughter with a serious health condition when the son or daughter is the employee's biological or adopted child (or in another legally recognized parent-child relationship with the employee), under 18 years of age, or 18 years of age or older *and* incapable of self-care because of a physical or mental disability.

The Administrator's Interpretation

The Administrator's Interpretation provides additional guidance as to when an employee's adult child qualifies under the FMLA as an individual who is incapable of self-care because of a physical or mental disability.

The guidance first specifies that the age of the child (whether minor or adult) at the time his disability initially manifests is irrelevant to whether an employee may take protected leave. If an employee's son suffers a stroke at age 25 that renders him incapable of self-care, the adult child qualifies as a "child" who is incapable of self-care.

The guidance next details the four requirements that must be satisfied for an employee to take this type of FMLA leave. An otherwise qualified employee may take job-protected leave to care for his adult "child" if that individual:

- has a disability pursuant the Americans with Disabilities Act;
- is incapable of self-care because of the disability;
- has a serious health condition; and
- is in need of care because of that serious health condition.

These requirements are further explained in the guidance document.

Examples

The following two examples in Administrator's Interpretation help illustrate the meaning of the new guidance.

In the first example, an employee's adult daughter is involved in a car accident that shatters her pelvis and limits her mobility for an expected six months. She is hospitalized for two weeks after the accident and requires the ongoing care of a health care provider. The guidance suggests that the daughter's shattered pelvis constitutes a serious health condition, and that if she needs assistance with at least three

activities of daily living (such as bathing or dressing), then she is considered incapable of self-care because of a disability. Therefore, the employee parent is entitled to job-protected leave to care for her.

In the second example, an employee's adult son is diabetic but lives alone with no assistance. While his medical condition qualifies as a disability under the ADA, he is not considered an adult child incapable of self-care under the FMLA because he requires no assistance. The guidance notes that if complications related to the son's diabetes later render him unable to care for himself and in need of regular kidney dialysis, then the employee parent will qualify for leave because the son will have a disability under the ADA, a serious health condition needing continuing treatment, and an inability for self-care.

Action for Healthcare Employers

The broadened definition of "disability" under the ADA will allow more employees to qualify for job-protected leave under the FMLA to care for adult children incapable of self-care. Employers should ensure that they correctly analyze employee leave requests for "children" 18 years of age or older to comply with this new guidance. FMLA policies also should be updated to incorporate recent regulatory revisions including military caregiver leave for a veteran, qualifying emergency leave for parental care, and leave for those acting "in loco parentis" (Opinion 2010-3). The 2013 updated FMLA poster also should be posted (WHD Publication 1420).

If you have questions about the Family Medical Leave Act or other employment law issues, please contact Kimberly Daniel (kdaniel@hdjn.com) or Jonathan Sumrell (jsumrell@hdjn.com) at (804) 967-9604. Additional information about Hancock, Daniel, Johnson & Nagle, P.C. is available on the firm's website at www.hdjn.com.