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PERSL 1416

TO: Agency Personnel Directors/Designees
Agency Labor Relations Directors/Designees

FROM: Carolyn Trevis, Acting Assistant Commissioner
Labor Relations Division



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RE: FMLA Update – Department of Labor clarification of “son or daughter”

I am writing to provide you an update relating to the Family and Medical Leave Act (“FMLA”) and the definition of “adult children.”

On January 14, 2013 the United States Department of Labor issued an Interpretation clarifying the definition of “son or daughter” under Section 101(12) of the FMLA as it applies to individuals 18 years of age or older (“adult children”) who are incapable of self-care because of a mental or physical disability.

The DOL’s Interpretation Expands the Definition

1. Age at Onset of the Disability is Not Relevant

There has been some confusion as to whether the adult child’s disability must have existed prior to reaching age 18. The interpretation clarifies that the age of an employee’s son or daughter at the onset of a disability is *not* relevant in determining that employee’s entitlement to FMLA leave; an employee may take FMLA leave to provide care to an adult child with a disability “regardless of when the disability commenced.” I believe this interpretation may expand the definition of “adult child” and that this expansion will have implications for state agencies’ review of Family Medical Leave requests made by employees with adult children.

1. Definition of “disability” under the ADA has Broadened in Scope

As you are likely aware, an employee can take FMLA-protected leave for an adult child only if the adult child has a mental or physical “disability,” as defined by the Americans with Disabilities Act (“ADA”), and is incapable of self-care because of that disability. The DOL interpretation affirms that the recent amendments to the ADA, by broadening the definition of “disability,” effectively also expand employee eligibility under the FMLA to care for an adult child with a disability.

There is a four-part test for an employee’s eligibility in this situation:

A parent will be entitled to take FMLA leave to care for a son or daughter 18 years of age or older, if the adult son or daughter:

- (1) has a **disability** as defined by the ADA;
- (2) is incapable of self-care due to that **disability**;
- (3) has a serious health condition; and
- (4) is in need of care due to the serious health condition

It is only when all four requirements are met that an eligible employee is entitled to FMLA-protected leave to care for his or her adult son or daughter.

Most significantly, the DOL notes that there is “no minimum duration” required for an impairment to be a disability; the effect of an impairment lasting or expected to last fewer than six months **can** be substantially limiting within the meaning of the ADA. Formerly, we have advised that the impairment must be of a more permanent nature. Now it appears that some temporary conditions may qualify as a disability (e.g., gestational diabetes may be a disability, although temporary due to it being a pregnancy-related impairment).

The interpretation also notes that the adult child’s qualifying disability *may* be –though need not be– related to the same “serious health condition” that requires the parent employee’s care. For practical purposes, there may be impairments that will satisfy both the expanded definition of “disability” and the definition of “serious health condition,” even though the statutory tests are different.

In light of the apparent broader definition of “disability” under the ADA and FMLA, the Department of Labor anticipates that more parents with adult children may qualify for FMLA leave. Therefore, you should adjust your analysis accordingly when reviewing whether an employee-parent qualifies for FMLA leave to provide care for adult children.

2. Leave to Care for Adult Children Injured in Military Service

The interpretation also addresses covered servicemember leave under the FMLA. The Department of Labor clarifies that, because it is not relevant *when* the employee's adult child becomes disabled, and because a covered servicemember's service-related disabling injury may have an impact lasting beyond the initial single 12-month period covered by the military caregiver leave entitlement, a servicemember's parent may take FMLA leave to care for a son or daughter in **subsequent** 12-month periods due to the adult child's serious health condition. The expanded definition of disability will therefore possibly result in more state employees qualifying for FMLA leave to care for their adult (servicemember) children beyond the initial 12 months provided by the military caregiver leave entitlement.

The Department of Labor's interpretation contains two illustrative examples and is accompanied by a Fact Sheet. The interpretation may be instructive for many FMLA scenarios involving state employees who have adult children with disabilities. For your convenience, I have included links to the interpretation and to its companion Fact Sheet. If you believe that this interpretation applies to a situation at your agency and you would like additional guidance, please contact me or your labor relations representative for further discussion of how to proceed.

Administrator's Interpretation 2013-1:

http://www.dol.gov/WHD/opinion/adminIntrprtn/FMLA/2013/FMLAAI2013_1.htm

Fact Sheet #28K:

<http://www.dol.gov/whd/regs/compliance/whdfs28k.htm>

FMLA Policy, Forms, Updates, and Postings are also available on MMB's website at:

(<http://www.beta.mmb.state.mn.us/lr>)