BusinessManagement DAILY

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Ask the Attorney: Exempt pay, FMLA before baby and reproductive health law

Expert attorney Nancy Delogu from Littler Mendelson addresses readers' questions. This month's topics include exempt employee pay when the office is closed, FMLA leave used for bed rest and New York's reproductive laws.

Must we pay exempts for a full week if the office is closed for some of it?

Q: "What are the conditions under which you are not required to pay an exempt employee for a day? If the company is closed for a few days, can we pay employees three out of the five normal workdays for which they will actually be at work?" – *Michael, California*

A: The salary pay provision of the Fair Labor Standards Act requires you to pay overtime-exempt workers their full wages for each day that they perform any work. Essentially, these employees are expected to work as few or as many hours as are necessary to get the job done.

Exempt employees generally must receive their full salary for any week in which they perform work, without regard to the number of days or hours worked. You can dock exempt workers' wages if they take one or more *full* days off for personal reasons, but that's not the same as docking their pay because your office is closed for the holidays or for some other reason that is not within the employee's control.

Note that in California, depending on the type of work and the overtime exemption, minimum annual salary levels, and other considerations may also apply.

What happens when FMLA leave is exhausted before the baby is born?

Q: "An employee is expecting a baby, but has had some complications and has been put on bed rest. She is currently on FMLA leave. By the time the baby is born, she will have already used 10 weeks of FMLA. Does the birth start a new FMLA leave cycle or is it a 12-week max within a year regardless of reason(s)?" – *Chrissy, Tennessee*

A: The Family and Medical Leave Act provides up to 12 weeks of job-protected leave in a 12-month period. Some jurisdictions offer additional leave through state or local legislation, with or without rights to reinstatement at the end of the leave. Your policies also may also be more generous.

For example, your employee may be eligible for short-term disability benefits for some weeks after the baby is born. You may want to invite the employee to speak with you about her plans and the options available to her if her condition permits.

What is required by New York's reproductive health law?

Q: "New York state now has a reproductive health law that needs to be included in employee

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handbooks. What exactly is required by the New York Labor Law section 203-e and how should it be presented? The requirements are not clear." – *Ken, New York*

A: As of November 8, 2019, New York State prohibits employment discrimination based on an employee's or a dependent's "reproductive health decision making." (This new protection comes less than one year after the New York City Council added "sexual and other reproductive health decisions" to the list of protected categories under the New York City Human Rights Law.) The law seeks to guarantee employees' rights to engage in reproductive health decision-making by prohibiting employers from:

- Accessing an employee's personal information regarding the employee's (or the employee's dependent's) reproductive health decisions, without the employee's prior informed affirmative written consent;
- discriminating or taking any retaliatory personnel action against an employee with respect to compensation, terms, conditions or privileges of employment because of or based on the employee's (or the employee's dependent's) reproductive health decisions; or
- requiring an employee to sign a waiver or other document that limits or denies employees the right to make their own reproductive health care decisions.

The law permits an employee to bring a civil action in court and, if successful, to receive back pay, benefits, and reasonable attorneys' fees and costs, as well as injunctive relief and/or reinstatement against any employer that "commits or proposes to commit" a violation of this law. Additionally, a court may award liquidated damages "equal to one-hundred percent of the award for damages…unless the employer proves a good faith basis to believe that its actions … were in compliance with the law." Employers are also prohibited from retaliating against workers who bring complaints under the law.

The new law took effect immediately, but the obligation to include a handbook provision notifying employees of their rights under the law (for employers that have employee handbooks) takes effect on January 8, 2020. The state has yet to provide guidance regarding the form of such notice. My colleagues who practice in New York believe it is reasonable to assume that it would include amending any list of protected classes, affirming the privacy of medical records and stating that retaliation is prohibited. We also advise employers to ensure that Human Resources personnel, managers and supervisors are trained regarding this new law and know to take steps to separate any information relating to any employee's reproductive health choices from employment-related decisions.

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