

FMLA may cost employers \$21 billion

by D. Michael Henthorne

A common misconception among employers is that the most expensive aspect of the Family and Medical Leave Act (FMLA) is the direct administrative and human resources costs associated with implementing, documenting, and tracking the leave of an eligible employee who exercises his rights under the Act - especially if the employee seeks or uses intermittent leave.

Under the FMLA, generally, an eligible employee is entitled to up to 12 weeks of unpaid leave in any 12-month period to care for his own serious health condition or that of an immediate family member as well as for the birth or adoption of a child.

The employee may, however, take some or all of his leave on an intermittent or reduced-leave schedule basis whenever medically necessary. As a practical matter, that can result in a substantial change in the employee's work schedule, including the employee working appreciably less than a full-time schedule over a period of several months or more.

A study conducted by the Employment Policy Foundation (EPF), a Washington, D.C.-based nonpartisan economic research and education foundation that focuses on workplace trends and policies, suggests that the use of FMLA leave by employees is rising and that the estimated actual costs of the Act go far beyond any administrative burden on employers.

The EPF surveyed employers to determine both the extent of FMLA leave and its costs to employers. In the April 19, 2005, issue of its employment and workplace policy newsletter, *Issue Backgrounder*, the foundation reported several key results of its employer survey regarding the costs and characteristics of FMLA leave to employers.

* More employees are taking FMLA leave - and more often *

The EPF's survey confirmed that the number of employees exercising their rights under the FMLA is increasing and that employees are taking shorter leave periods, but more often:

The EPF FMLA survey shows that employees are significantly more likely to use FMLA compared with a survey taken four years ago. According to a 2000 study by the U.S. Department of Labor [DOL], only 25 percent of employees who used FMLA, used it more than once annually, implying that FMLA usage was infrequent.

In contrast, EPF's survey found that in 2004 employees

took multiple episodes of leave nearly one and a half times as frequently, with 35 percent of leave-takers taking FMLA leave more than once. Additionally, the EPF survey found that in 2004, nearly 15 percent of FMLA leave taken by a given employee was for 6 or more episodes a year.

Discussing the challenges that employers face regarding intermittent leave, the EPF newsletter continued:

Intermittent leave is generally taken in separate blocks of time often due to a single illness, chronic condition or injury and may include leave periods from as little as an hour to a day or more.

Intermittent leave currently makes up a sizeable minority of all FMLA leave. Thirty percent of all FMLA leave is less than 5 days in length and 20 percent was for one day or less. Based on anecdotal evidence, examples include a couple hours of leave taken on an occasional basis for medical appointments or leave due to a chronic condition such as migraine headaches or asthma taken sporadically over a period of months.

Intermittent leave under the FMLA presents challenges in coping with possibly frequent unscheduled absences over a long period and in tracking leave taken. For cases involving the birth or placement of a child for adoption or foster care, FMLA leave on an intermittent or a reduced work schedule is permitted only if an employer agrees.

However, for cases involving an employee's serious health condition or that of an employee's immediate family member, an employer must grant the employee FMLA leave on an intermittent or reduced schedule basis, provided the employee has provided certification that the chronic condition exists and generally meets the definition of a serious health condition.

Individual episodes of the condition are not subject to certification, leaving employers to contend that some employees regularly abuse chronic conditions to take job protected leave.

The EPF survey results also revealed that "nearly 50 percent of all FMLA leave takers do not provide notice before the day the leave is taken. According to the survey, in over 30 percent of cases, employees provide notice after the leave has started."

Accordingly, employers are typically left with little, if any, time to plan for any necessary adjustments to work schedules brought about by an employee taking FMLA leave.

* Direct cost of FMLA leave: \$21 billion ... and rising *

The EPF estimates that the total overall direct cost of FMLA leave on employers, in 2004 alone, was approximately \$21 billion. That total figure, according to the study, consisted primarily of (1) decreased profits - estimated at approximately \$4.8 billion - because of lost productivity; (2) continuation of group health care benefits; and (3) costs associated with the net replacement cost of labor, including additional wages to other employees called on to work additional hours to replace employees taking FMLA leave.

In concluding the total direct cost figure was likely underestimated and that further study was warranted, the EPF noted that the \$21 billion figure did not include "the added administrative burden employers face in tracking and complying with FMLA leave" or "the secondary economic impact of declining profitability on economic activity."

* What next? *

The DOL is presently considering whether amendments to existing FMLA rules and regulations are required. Prudent employers will continue to adhere to the current DOL regulations as well as cases that interpret those regulations in their implementation of the FMLA while advocating for appropriate changes designed to minimize opportunities for the abuse of FMLA leave rights.