



New Employee Leave Entitlements Under State and Federal Law

In late March and early April, Washington Governor Christine Gregoire signed two bills into law that create additional employee leave rights for employees who are victims of domestic violence or who have family members in the United States Armed Forces. These new laws, which apply to all Washington employers regardless of size, were enacted by the Washington Legislature without any significant opposition. These changes to state law follow a recent amendment to the federal Family and Medical Leave Act which also provides additional leave entitlements for eligible employees with family members in the Armed Forces. Employers should promptly update their leave policies and employee handbooks and should otherwise establish procedures to ensure compliance with these new laws. Please let us know if you need assistance. Here are the details:

Washington Employers Must Provide Domestic Violence Leave for Victims and Family Members

Effective as of April 1, 2008, victims of domestic violence, sexual assault or stalking are entitled to take intermittent or other reasonable leave from work to take care of legal or law enforcement needs or to get medical treatment, social services assistance or mental-health counseling, or to relocate to a safer location or to otherwise engage in safety planning to protect the employee or his/her family members from domestic violence, sexual assault or stalking. Employees are entitled to domestic violence leave either because they are a victim of such violence or stalking, or in order to assist close family members such as parents or children who are victims of such acts. The new law applies to all Washington employers, both public and private and regardless of size. The only exception is that this new law does not apply to temporary staffing agencies. Importantly, the new statute says these leave requirements are in addition to any other leave rights provided under state or federal law.

An employee is required to give advance notice of the need for leave whenever such notice is possible. If advance notice is not possible, the employee must provide notice by the end of the first day of leave. Employers may require timely verification of the need for leave, and such verification may take the form of police reports, court orders and letters from the employee's attorney. But employers must also accept verification in the form of an employee's written statement that the employee or employee's family member is a victim of domestic violence, sexual assault or stalking and needs assistance.

Employees who take leave under this new law may elect to use their vacation or PTO time to

pay for such leave, or they may elect to take unpaid leave. Employers are not permitted to discipline or take any adverse action against any employee because he or she takes time away from work as authorized by this new law. The law does not provide any guidance as to how much leave may be "reasonable" in any particular set of circumstances.

The new law is drafted to provide employees with substantial privacy rights in connection with the need for such leave. Lawful employer inquiries are limited to the following: (1) why the leave is needed (i.e., domestic violence, stalking, or sexual assault); (2) the identity of the victim (i.e., the employee or specified family member); and (3) verification that the victim is a qualifying family member (i.e., parent, parent-in-law, spouse, child, grandparent or person with whom the employee has a dating relationship). Employers must protect the confidentiality of all such information, and are not permitted to inquire about such matters as the particulars of the incident giving rise to the need for leave, or the location at which the employee or family member may be located during any such leave.

Employers must continue group health coverage for any employee who takes leave under this new law, and such coverage must be maintained under the same terms (and with the same costs) as those which apply to individuals who are actively employed by the employer.

Employers may be subject to substantial penalties for failure to comply with the law, and employees have a statutory right to file a lawsuit in Washington state courts in order to obtain such remedies under this law.

Washington's Department of Labor & Industries is responsible for enforcement of this new law, but the agency has not yet had sufficient time to develop any meaningful enforcement or interpretive guidance. We will publish a new update as soon as any helpful information is available from the Department.

Expansion of Leave Entitlements for Families of Individuals in the Armed Forces

Most employers are familiar with the comprehensive job protections and employee benefit entitlements available under the federal USERRA law to employees who are serving in, wish to serve in, or are returning from service in the United States Armed Forces. New state and federal laws now provide job-protected leave-of-absence entitlements to employees who have family members who are serving, or are about to serve, in the armed forces.

Washington's New Military Family Leave Act (MFLA)

Effective as of June 12, 2008, Washington's new MFLA will allow an employee to be absent from work to spend time with a spouse who is preparing for military deployment or who is on a short-term leave from such deployment during times of military conflict. The law applies to all employers regardless of size, but is only available for employees who regularly work at least 20 hours a week for the employer.

An eligible employee is entitled to 15 days of unpaid leave while his or her spouse is preparing to deploy or is on leave from a military deployment during times of military conflict as declared by the President or Congress. In these circumstances, the employee may take leave for virtually any purpose (e.g., to take a family vacation or to get the family's finances in order or whatever).

The employee may elect to use paid leave (e.g., under PTO or vacation pay programs) instead of unpaid leave. All such leave is job protected, just as it is under the FMLA and Washington Family Leave Act. To be eligible for leave, the employee must notify his/her employer regarding his/her intent to take such leave within 5 days of receiving notice of the impending call or order to active duty or leave from deployment. It is not clear from the statute whether an employee may take such leave in addition to leave provided under other state or federal laws. We would expect the Department of Labor & Industries to provide guidance on this and other aspects of the law sometime in the next several months. We will provide you with additional information as soon as the Department provides any useful guidance.

Federal Family and Medical Leave Act Expanded to Include a Military Component

The federal FMLA has been amended to add another set of circumstances in which an employee may be entitled to 12 weeks of FMLA leave: "any qualifying exigency arising out of the fact that a spouse, son, daughter or parent is on active duty" in the United States Armed Forces. In addition, an employee may now be entitled to a total of 26 weeks of FMLA leave to care for a family member in the Armed Forces who has a serious injury or illness that renders the individual unfit for active duty. Note this is different than the otherwise applicable FMLA definition of "serious health condition." The statute indicates the maximum FMLA entitlement in any one year will be 26 weeks, but does not otherwise provide much clarity as to definitions of certain terms or as to the manner in which these new leave requirements will be administered by the U.S. Department of Labor. The Department is currently in the process of developing regulations to define these terms and to assist employers in complying with the new law. We will provide you with a new update as soon as more information is available from the Department.

These new amendments to the federal FMLA also raise questions as to the interaction between the state and federal FMLA rules. Existing Washington law specifically states that state and federal FMLA leave are to be taken concurrently, but the newly expanded federal FMLA includes leave rights that do not currently exist under Washington law. For this reason, it is not entirely clear whether an employee who takes certain types of federal FMLA leave (i.e., in the case of a qualifying exigency for a family member in the Armed Forces) might be entitled to additional leave under state law. Here again, the Washington Department of Labor & Industries has not yet had sufficient time to prepare or publish regulations or other guidance on this issue. We will provide you with another update as soon as the Department has published any such guidance.

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