

KAHN, DEES, DONOVAN & KAHN, LLP
ATTORNEYS & COUNSELORS AT LAW

July 2000

FMLA COMPLIANCE PROBLEMS

by Tom Magan

The Family and Medical Leave Act has been around since 1993, yet employers are still having difficulty complying with its provisions.

When an employee requests a leave and presents a doctor's note, the employer has three options: (1) Inquire into the employee's condition; (2) Grant the leave; or (3) Request a certification.

Some employers are hesitant to inquire about the employee's reasons for being absent. Employers have the right to ask for enough detailed information about an absence to determine if the absence is covered by the FMLA.

Employers may even inquire about the reason for each day of absence. In some cases, an employee may need to have been off for two or three days, but not the fourth day which under some circumstances triggers the FMLA.

Before granting an FMLA leave for a serious health condition, employers should first evaluate whether the employee/family member is incapacitated by a serious health condition according to the law.

Record keeping continues to be a problem for employers. Under the FMLA, it is important to keep complete, detailed and accurate records of when an FMLA leave is used. Failure to do so means that the employee continues to have the right to FMLA time off and the employer may not legally discipline or terminate the employee during the FMLA leave.

Along the same lines, employers have to give a written and timely notice to employees that their time off is being considered as FMLA time. This responsibility should probably be assigned to someone in the personnel department rather than a busy supervisor or manager who may fail to give the notice.

Some employers fail to recognize the FMLA's almost absolute reinstatement requirement. Terminating an employee who is on FMLA leave violates the Act and could lead to possible litigation.

Employers must also remember to determine if they have any applicable Americans with Disabilities Act (ADA) leave-of-absence obligation even after the maximum amount of FMLA leave has been taken. Under some circumstances, the employer should continue to provide leave as a reasonable accommodation under the ADA. When such leave should end is a big question.

Those with a no-fault attendance policy may not assign points for any time spent on FMLA leave.

Of course it is important not only to train supervisors and managers, but to retrain them on their obligations under the Act and interplay between the FMLA and the Americans with Disabilities Act.

NEW ASSOCIATE JOINS KDDK

Amy E. Steinhart, a 1990 alumna of Reitz High School, received a Bachelor's Degree in Biology and Environmental Studies from Indiana University in 1994 and a J.D. from Indiana University - Bloomington in 1997. Amy's practice concentrations have been in business and real estate transactions, banking law, and creditor's rights. She is a member of the Evansville, Indiana and American Bar Associations and is a volunteer for Junior Achievement.

Amy and her husband, Ryan, a mechanical engineer, were married in 1998.

"The tax code is a 'fantastic labyrinth' whose words 'merely dance before my eyes in a meaningless procession: cross-reference to cross-reference, exception upon exception . . . that offer no handle to seize hold of. . [that] leave in my mind only a confused sense of some vitally important, but successfully concealed, purport, which it is my duty to extract. .'"

"We find no basis therein for our undertaking to put words into the statute that, whatever the reasons may have been, Congress did not put there. Our task is to construe and apply, not to write, legislation. We would do well to heed these words. The Code sections in this case are complicated enough without our convoluted interpretation of them overlaying the existing confusion."

"Bearing in mind that the Code is of nationwide application affecting tens of millions of taxpayers, it is difficult to understand why it is so constructed. . . Surely, there must be a better way of constructing a fair and workable system of taxation."

"We have from time-to-time complained about the complexity of our revenue laws and the almost impossible challenge they present to taxpayers or their representatives who have not been initiated into the mysteries of the convoluted, complex provisions affecting the particular corner of the law involved.... Our complaints have obviously fallen upon deaf ears."

"All would have agreed that this dispute is an artifact of the corporate income tax, which by divorcing taxation from real persons' wealth, income, or consumption is bound to combine tricky definitional problems with odd incentives."

"We are constrained to interpret and enforce the tax laws as Congress has enacted them. We may neither re-write the statutes nor divine an interpretation that is inconsistent with their clear language. And this rule applies despite the most absurd results."