CHANGES TO STATE AND FEDERAL LEAVE LAWS
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There recently have been significant changes to both state and federal employee leave requirements. This article begins by discussing the changes to Washington State law and then discusses the changes to the federal law.

I. NEW WASHINGTON FAMILY LEAVE REQUIREMENTS

LEGAL BACKGROUND

Effective January 1, 2003, Washington State is expanding employees' ability to use various forms of leave to care for family members. Currently, employers are required to allow employees to use their sick leave to care for their children under age 18 unless an employer's policy or collective bargaining agreement provides otherwise. The new law not only gives employees a choice of what leave to use in order to care for their children, but expands the definition of "child" to cover caring for any child of the employee, including a biological, adopted, foster, stepchild, legal ward, or a child of a person standing *in loco parentis* (acting as a parent) who is under 18, or over 18 and incapable of self-care because of a mental or physical disability. Moreover, where the old law solely addressed leave with respect to an employee's child, the new law permits an employee to use leave to care for a spouse, parent (including biological parents and persons who acted as parents when the employee was a child such as step-parents), parent-in-law, or grandparent.

The new law further clearly establishes that an employee is no longer limited to using accrued sick leave for family leave purposes, but may also use vacation or personal holidays if such other paid time is part of the employer's policy or collective bargaining agreement. An employee may not take advance leave until it has been earned, and any employee taking leave under the foregoing circumstances must comply with the terms of any collective bargaining agreement, if applicable, or other employer policy applicable to the leave.

Similar to the federal Family Medical Leave Act, the new law states that an employer shall not discharge, threaten to discharge, demote, suspend, discipline, or otherwise discriminate against an employee where the employee has exercised or attempted to exercise their rights under the new law.

PRACTICAL GUIDELINES

- The new law does not require employers to offer sick leave or other paid leave, but where the employer does offer such benefits, the employer will be obligated to provide such leave for an employee's family leave purposes in accordance with the new law.

- Employers should ensure that their employment policies and collective bargaining agreements (if applicable) are up to date and incorporate the provisions of the new law. For example, a policy change may be necessary to clarify that using vacation or sick leave to care

for a spouse counts towards any available FMLA leave time. Policies regarding shared leave may also be affected.

- Employers may want to reconsider the costs associated with providing leave, especially sick leave, as usage of sick leave will probably increase because it can be used to cover more situations than ever before.

- An employee can use his or her leave regardless of whether there are other people in the employee's family who may be better situated to care for the sick relative. For example, an employer cannot require the employee's spouse to exhaust the spouse's leave before allowing the employee to use the employee's leave to care for a parent-in-law.

II. FAMILY MEDICAL LEAVE ACT NOTICE CHANGES

LEGAL BACKGROUND

The interpretation of the federal Family Medical Leave Act ("FMLA") has largely been left to the Department of Labor ("DOL"), which has issued extensive regulations covering the statute. One of those regulations requires that employers provide notice to employees that the leave they are taking is considered FMLA leave, and is therefore being counted against the employee's entitlement to up to 12 weeks of leave in a 12-month period for family purposes such as serious health conditions, child birth, maternity, and personal illness. (Employers subject to the FMLA include all public employers, regardless of size, and private employers who have 50 or more employees within 75 miles.) Under the regulation, if the employer fails to give notice, then the leave is not considered FMLA leave, no matter how long it lasts.

The United States Supreme Court recently addressed this notification requirement in Ragsdale v. Wolverine, when it held that an employer that failed to provide notice of FMLA entitlement to an employee did not have to provide more than 12 weeks leave to that employee.

In Ragsdale, an employee with cancer took a 30-week leave for treatment. The employer never informed the employee that the 30 weeks would count against her 12-week FMLA entitlement. The employer denied the employee's request for additional leave beyond 30 weeks and terminated her when she did not return to work. Relying on the DOL regulation, the employee sued for reinstatement, 12 more weeks of leave, and back pay. The Supreme Court denied her claim and struck down the DOL regulation as incompatible with the FMLA. According to the Court, given that the employee stated she would have taken 30 weeks leave even if she had known it would count towards her FMLA leave, the regulation wrongly removed the employee's burden of having to prove an FMLA violation. In other words, the penalty on the employer (having to provide another 12 weeks of leave) was unconnected to any actual harm that the employee might have suffered from the employer's failure to notify. The Court viewed this as incompatible with the FMLA's remedial nature.

PRACTICAL GUIDELINES

- Although Ragsdale rejected the concept of making employers provide an extra 12 weeks of leave whenever they fail to notify employees that the leave they are taking is considered FMLA leave, the Court did not explain what an adequate remedy would be. In other words, if an employer fails to give notice, it is still possible that the employer could be penalized in some other way. As a result, employers should try to comply with the FMLA notice requirements.

- Keep accurate records of the dates that an employee takes FMLA leave.

- Make sure that you inform an employee taking FMLA leave that the leave taken will be counted towards the employee's FMLA entitlement within two business days of discovering that the leave taken is subject to the FMLA.

- Employers can make the determination that leave taken is FMLA leave if the FMLA's criteria are met, even if the employee does not want the leave to be counted towards his or her FMLA leave entitlement.

- If you have any questions regarding the DOL regulation discussed in Ragsdale or the FMLA's notice provisions in general, contact the Department of Labor or an attorney with experience in this area of law.

- Remember that you may be required to provide additional leave as a reasonable accommodation under the Americans with Disabilities Act ("ADA") or state disabilities law, in addition to the leave that is required under the FMLA. The amount of additional leave depends on the circumstances. There is no hard-and-fast rule.

The information set forth in this notebook is a broad and general overview of a complex topic, and is not legal advice. If you wish to retain Ogden Murphy Wallace, P.L.L.C. to assist you with an employment law issue, please do not hesitate to contact us.

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