New DOL Guidance on FMLA Leave to Care for Adult Children

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On January 14, 2013, the U.S. Department of Labor (DOL) issued an Administrator’s Interpretation with guidance on FMLA leave to care for adult children. An eligible employee can take FMLA leave to care for a child age 18 and older if the child has a disability within the meaning of the Americans with Disabilities Act (ADA) and is incapable of self-care because of that disability. This is in addition to the requirement that a child have a serious health condition and the employee being needed to care for the child.

The DOL’s guidance addresses three main topics:

- Age of the child at the start of the disability;
- Impact of the ADA Amendments Act (ADAAA), specifically the new broader definition of “disability” in the ADA, on leaves to care for adult children; and
- FMLA leave to care for an adult child wounded in military service.

Age of Child at Start of Disability

Neither the FMLA nor the DOL’s regulations address whether an adult child’s age at the start of a disability matters for purposes of leave to care for the child. After a thorough analysis of the FMLA’s legislative history and its own enforcement experience, the DOL confirmed that the adult child’s age at the start of the disability is irrelevant to determining whether an employee can take leave to care for the child. So, the child’s disability can start before or after the child turns 18.

Aon Hewitt Comments: The substance of this guidance is not surprising, but it is somewhat surprising that the DOL felt the need to provide it. The DOL, however, referred to some confusion over whether the child’s disability must have existed before the age of 18 or could have started in adulthood.

Impact of the ADAAA

The DOL has adopted the ADA’s definition of disability for purposes of FMLA leave to care for adult children, including the broader definition required by the ADAAA. Simply put, a disability is an impairment that substantially limits a major life activity. Regulations implementing the ADAAA contain definitions and interpretations that make it relatively easy for individuals to be covered as disabled.

In addition to having a disability, however, the adult child must be incapable of self-care because of that disability. Incapable of self-care means that the adult child requires active assistance or supervision to provide daily self-care in at least three activities of daily living (ADLs) or interactive activities of daily living (IADLs). ADLs and IADLs are tasks that people usually need to do for living independently, and include dressing, eating, shopping, and maintaining a residence. The determination of whether an adult child is incapable of self-care is fact-specific and made at the time FMLA leave is requested.
The DOL provides some examples that illustrate how the adult child must have both a disability that makes the adult child incapable of self-care, and a serious health condition that makes the adult child in need of care. One example is about a 25-year-old son who has diabetes but lives independently and does not need assistance with any ADLs or IADLs. Although his diabetes is a disability, the son is not incapable of self-care. His parent, therefore, would not qualify for FMLA leave to care for him.

The DOL also notes that many impairments will be both a disability under the ADA and a serious health condition under the FMLA, even though the definitions are different. For example, the 25-year old son may develop complications from diabetes that require continuing treatment by a doctor and make him unable to perform ADLs/IADLs. The diabetes would then be both an ADA disability and an FMLA serious health condition.

**Aon Hewitt Comments:** The ADAAA’s broad definition of disability can make it challenging for employers to contend that individuals are not disabled. And, an employer can face some risk if it denies a leave request to care for an adult child after only concluding the child does not have a disability. As such, employers with employees seeking this leave should instead focus on whether the child is incapable of self-care, and whether the child has a serious health condition that requires the employee’s care.

**Adult Child Wounded in Military Service**

The FMLA allows eligible employees to take military caregiver leave, which can be taken by parents and other relatives of servicemembers who have sustained a serious injury or illness in the line of duty. The entitlement is up to 26 weeks in a single 12-month period.

An adult child’s injury or illness may last beyond the single 12-month period, and the DOL confirmed that the child’s parent may take FMLA leave in subsequent 12-month periods. The adult servicemember’s parent may exhaust 26 weeks of military caregiver, but may be entitled to 12 weeks of leave in the next 12-month period if the servicemember’s injury or illness is then an ADA disability that makes him or her incapable of self-care, and if the injury or illness is an FMLA serious health condition and the parent is needed to care for the servicemember.

**Aon Hewitt Comments:** Through this part of the Administrator’s Interpretation, the DOL clarified that FMLA leave to care for adult children can be taken for wounded servicemembers. Employers must allow this leave if all criteria are met.

**Resources**

The Administrator’s Interpretation is available at:  
http://www.dol.gov/WHD/opinion/adminIntrprtn/FMLA/2013/FMLAAI2013_1.htm

A DOL fact sheet is available at:  
http://www.dol.gov/whd/regs/compliance/whdfs28k.htm

DOL “Questions and Answers” are available at:  
http://www.dol.gov/whd/fmla/AdultChildFAQs.htm
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