

## Steps To Ensure FMLA Rights For Adult Children

Law360, New York (February 26, 2013, 12:43 PM ET) -- All covered employers know that the Family and Medical Leave Act entitles an eligible employee to take up to 12 weeks of unpaid, job-protected leave during a 12-month period to care for a "son or daughter" with a serious health condition. While most employers have dealt with an employee's FMLA rights to take leave to care for any child under the age of 18, not all have considered when obligations arise with adult children.

By its Jan. 14, 2013 administrator's interpretation letter (No. 2013-1), the U.S. Department of Labor has provided some guidance for employers regarding this issue.

### Where to Start with Adult Children and FMLA Eligibility

A parent-employee is entitled to FMLA leave to care for an adult child if the adult child: has a disability as defined by the Americans with Disabilities Act, is incapable of self-care due to that disability, has a serious health condition and is in need of care due to the serious health condition. The DOL interpretation makes clear that when the adult child became disabled does not matter — just the fact of the disability.

How do you determine when an employee is entitled to take leave to care for an adult child that you are not sure has a disability? Here are some suggested steps.

#### ***Step One: Is the Child Disabled?***

Start with the ADA definition of a disability: "an impairment that substantially limits one or more major life activities." 42 U.S.C. § 12102(1). Remember that Congress made this extremely broad with the Americans with Disabilities Act Amendments Act (ADAAA). Under the ADAAA, the meaning of "substantially limits" is not very limiting and does not require that the impairment "prevent, or severely or significantly restrict" the performing of the major life activity.

To make matters even muddier, the ADAAA defined "major life activity" to include almost anything, like caring for oneself sleeping, breathing or concentrating or the operation of any major bodily function. 42 U.S.C. § 12102(2)(A), (B). Also recall that the ADAAA made clear that an impairment need not be permanent or long-term or meet any minimum duration to qualify as a disability.

And don't forget about pregnancy-related impairments. While pregnancy itself is not a disability, an adult child's gestational diabetes or other pregnancy-related impairment could count.

## ***Step Two: Is the Child Incapable of Self-Care Because of the Disability?***

Don't despair. Even if the adult child has a disability, he or she still has to "be incapable of self-care" because of the disability for the child to qualify as an FMLA son or daughter. This is a fact-specific determination that must be made based on the child's condition at the time of the requested leave.

Accordingly, the employer must look at whether the disability results in the adult child requiring "active assistance or supervision to provide daily self-care in three or more of the 'activities of daily living' (ADLs) or 'instrumental activities of daily living' (IADLs)." ADLs include grooming, hygiene, bathing, dressing and eating, while IADLs include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephone and directories, using a post office, etc. The child's disability must affect these ADLs and IADLs.

## ***Step Three: Does the Child Have a Serious Health Condition under the FMLA?***

Once you have determined that the adult child is disabled (which is likely under the ADAAA) and incapable of self-care, your next step is to determine whether he or she has a serious health condition that qualifies under the FMLA. Require the medical certification, and follow your usual procedures to do this.

### **DOL Examples**

The interpretation offers two examples which provide some guidance.

#### ***Example 1***

An otherwise healthy 37-year-old daughter shatters her pelvis in a car accident and cannot stand, walk or sit as a result. Although she is expected to recover, she will be substantially limited in her ability to walk for six months.

Is she disabled under the ADA? Probably so — given that she cannot stand, walk, or sit, she has an impairment that severely restricts a major life activity, even if only for six months. Is she incapable of self-care because of the disability? Probably so — assuming her shattered pelvis results in her needing assistance in at least three ADLs or IADLs.

If her parent submits the appropriate FMLA medical certification, the parent will qualify for FMLA leave, even though the adult daughter was not disabled before the accident and is expected to make a full recovery.

#### ***Example 2***

An employee's son has diabetes but he lives independently and requires no assistance with any ADLs or IADLs. He has a skiing accident that hospitalizes him but does not render him disabled (like a shattered pelvis would).

Is he disabled under the ADA? Yes, his diabetes is clearly a covered disability because it substantially limits the operation of a bodily function — his endocrine system. Is he incapable of self-care because of the disability? No, he lives on his own with no assistance.

Accordingly, his parent is not entitled to take FMLA leave because of his skiing accident. If his skiing injuries are severe enough (like a shattered pelvis), he might have a disability separate from his diabetes. Also, if he later becomes unable to walk or care for himself because of his diabetes, his parent would then qualify for FMLA leave to care for him.

## **Caveat for Wounded Military Personnel**

The DOL notes that this will expand FMLA options for parents of wounded military personnel. Under the military caregiver provision of the FMLA, the parent of a covered service member injured on active duty is entitled to up to 26 workweeks of leave in a single 12-month period.

However, once that 12-month period is over, the parent may qualify for regular FMLA to care for the adult child with a serious health condition, which could be the same injury or illness that justified the 26-week leave.

The interpretation gives the following example: A father-employee's 20-year-old son returns from active duty with extensive burn injuries to his body. The father takes 26 weeks of military caregiver FMLA to care for him. The father returns to work but later (in another FMLA leave year) seeks to take FMLA leave to care for that same son, who is having surgeries or skin grafts related to his burns.

Don't get sidetracked by the prior 26 weeks of leave — you need to go through the same analysis you would for any other FMLA request regarding an adult child. Is the son disabled? Is he incapable of self-care because of his disability?

Then you need to determine if the father is eligible for FMLA leave. If the father took 26 weeks of leave in the prior year, he may not have worked 1,250 hours in the 12 months before his leave. Always check eligibility.

### **Takeaways**

Make sure your supervisors and anyone else in the FMLA chain is sensitive to the issue of adult children and FMLA leave. Don't assume anyone is or is not covered. Address each case based on the facts at that time. Follow the same steps with each request, including checking eligibility.

A copy of the administrator's interpretation letter is available on the DOL website.

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