Employee Benefits Report

Garcia Insurance Services
Debra S. Garcia, LUTCF
1370 Trancas Street, Suite 161, Napa, CA 94558
Phone: (707) 321-7351 • Fax: (707) 256-3321
debbiegarcia@sbcglobal.net • www.garciainsuranceservices.net
CA License #0753777

Compliance Corner January 2007 Volume 5 • Number 1

Complying With the Family and Medical Leave Act

The FMLA allows eligible employees to take up to 12 weeks' unpaid leave. Who is eligible and when? Read on for details.

If your company employs at least 50 employees within a 75-mile radius, the federal Family and Medical Leave Act (FMLA) applies to your workforce. The Act entitles eligible employees of covered employers to up to 12 weeks of unpaid leave for their own serious health condition, a serious health condition of an immediate family member, or the birth or adoption of a child. Employees who have been employed by the employer for at least one year and worked at least 1,250 hours in the current or previous calendar year are eligible for leave.

FMLA regulations define a serious health condition as any condition that causes one of the following:

- Inpatient care where the person is admitted to the hospital overnight and any period of incapacity following hospitalization
- A period of incapacity of three or more days
- Treatment from a health care provider two or more times
- A continuing regimen of treatment by a health care provider
- Any period of incapacity due to pregnancy or prenatal care
- Treatment for a chronic serious health condition such as asthma, diabetes or epilepsy
- A period of incapacity due to a permanent or long-term condition for which treatment may not be effective, such as Alzheimer's or stroke; or
- Multiple treatments from a health care provider on referral from another health care provider.

To ensure employees are taking leave for legitimate purposes, employers should request medical certification of the need for leave. Under FMLA regulations, employees do not have to provide certification unless the employer asks for it.

Granting or denying FMLA leave involves some rather tight deadlines. When they foresee need for leave, employees are

COMPLAINCE—continued on Page 2

This Just In

Need help with compliance? The Small Business Administration recently enhanced the legal compliance section of its Web site to include compliance news, filing forms from nearly 100 federal government Web sites and contact information for compliance assistance throughout the federal government. See www.business.gov.

Only five cents of every healthcare dollar goes toward prevention and wellness programs; the other 95 cents pay for treatment. The Texas Coalition for Worksite Wellness aims to reduce the discrepancy with a series of regional presentations entitled An Ounce of Prevention. The group estimates that every dollar invested in wellness programs yields between $3.50 and $6 in reduced absenteeism, higher productivity and lower health care costs.

COMPLIANCE—continued from Page 1

supposed to provide their employer with at least 30 days' notice. However, when the need is not foreseeable, FMLA regulations state that employees are to inform the employer "as soon as practicable." Regulations require employers to decide whether leave can be designated as FMLA leave within two business days of receiving the request.

Employers can buy some time by granting provisional approval of leave. For instance, an employee asks for leave beginning in 30 days. The employer requests medical certification. The employee has 15 days to obtain it. Obviously, the employer cannot gather enough information to approve the leave within two business days. The employer, however, can provisionally approve the leave (assuming the employee is eligible), pending satisfactory medical certification.

FMLA leave is generally unpaid. However, employers that provide sick leave or paid time off may allow employees to substitute paid leave for the unpaid leave. Ultimately, employers decide whether the time off is paid or unpaid, but it is wise to have a consistent policy and stick to it. Inconsistency in applying the policy may lead to charges of discrimination.

Eligible employees may take FMLA leave for the serious health condition of an immediate family member. Federal law does not recognize domestic partnerships, but leaves the definition of marriage to the employee's state of residence (note: not the state of employment). FMLA regulations define "immediate family" as spouse, parents, children under 18 or disabled children over 18. In-laws and domestic partners are not immediate family members under the federal FMLA. Some state leave laws allow leave to care for domestic partners.

Employees may take intermittent leave, where they work a reduced schedule. For instance, an employee who must attend follow-up medical appointments following a serious illness could use FMLA leave to go to those appointments.

Most employees returning from FMLA leave are entitled to reinstatement to the same or equivalent position as the one they left. Key employees are the exception. Key employees are those whose position is so integral to the company's success that employers must replace them when they go on leave. Key employees must be in the top ten percent of company payroll.

Employers can refuse to reinstate a key employee if doing so would cause "grievous economic harm." If the employer makes this determination after the employee is on leave, the key employee has the right to return immediately. Employers should be prepared with solid economic data to prove their claim of "grievous economic harm."

Coordinating FMLA With Other Laws

Frequently, employees who have a serious health condition under the FMLA are also disabled within the meaning of the Americans with Disabilities Act (ADA). But employers must remember that the two are not the same. A person is disabled under the ADA if he or she suffers from a mental or physical impairment that "substantially limits a major life function" such as sleeping, eating or caring for oneself. To be protected in the workplace, an employee must be disabled within the ADA's meaning, but still be able to perform the job's essential functions with or without a reasonable accommodation.

Employers sometimes run into trouble when they terminate employees after they exhaust their 12 weeks of FMLA leave. If an employee is disabled after the 12 weeks, he or she may still have protections under the ADA. For instance, an employee has been off on FMLA leave for 12 weeks, but his doctor restricts him to three more weeks of rest. Those three weeks could be considered a reasonable accommodation under the ADA. In this case, the employer would be wise to give the employer the additional three weeks and allow him to come back to work.

Courts will allow an employer to terminate an employee who has used all of her FMLA leave, if the employer can demonstrate that providing the additional time off would be an undue hardship on the employer. An undue hardship for one employer may not be one for another. So employers should document the amount of money and workplace disruption providing the accommodation would entail. The burden is on the employer to prove the accommodation is an undue hardship.

The FMLA also overlaps with Title VII of the Civil Rights Act. Employers cannot discriminate against employees because they are pregnant or may become pregnant. Doing so violates both acts.

Benefits

Employers that provide health benefits to their employees must maintain them while an employee is on FMLA leave. If the employee pays some or all of the premiums, the employee is still responsible for making those premium payments. Employers can make arrangements to help the employee pay premiums if the leave is unpaid.

The ADA allows employers a little more flexibility. Employees taking leave as a reasonable accommodation are only entitled to keep their health benefits if other employees on unpaid leave or working reduced schedules are also eligible for them.

State Family Leave Laws

Federal regulations make it clear that the FMLA is just the floor for family leave benefits. States are free to provide greater benefits if they so choose. Sixteen states and the District of Columbia provide benefits above those of the FMLA for private-sector employees. Some states (California, DC) offer longer periods of leave for pregnancy. Others (Illinois, Maine) offer military family leave that allows spouses or parents of military personnel who have been deployed time off to help care for children. Massachusetts offers time off to care for seriously ill in-laws.

Most, but not all, states have codified the family leave rights of public employees. Although FMLA regulations claim to cover all public employees, some states challenged the constitutionality of the law. The Supreme Court ruled that states were subject to provisions requiring public employers to provide leave for the employee's own serious health condition and childbirth, but stopped short of ruling that state employees were entitled to family leave to care for a family member's serious health condition. That issue is still unresolved.

Employers should check the laws in their states and develop leave policies to comply with both the federal and state laws.

Congress Looks at E-Health Records

Legislators have been touting a national system of electronic medical records as a way to improve healthcare. Here's a look at some of the proposals and their possible consequences.

Although the final form is still not clear, some form of national electronic medical record database will be established soon. Last July, the House of Representatives approved the Health Information Technology Promotion Act of 2006, which would help upgrade the national health data infrastructure to handle large numbers of electronic medical records. At press time, the bill awaited consideration in the Senate.

The House is also considering the Personalized Health Information Act of 2006 (PHIA). This bill would pay doctors $2 per record to digitize Medicare patients' records and place them online. The records could only be accessed by patients and those whom patients authorize to do so. Another bill would digitize federal employees' medical records.

These pieces of legislation all have one goal in mind: better health care through information sharing. In some models, doctors could not only access their patients' records, but could look at large groups of medical records whose identifying data had been removed. They could track patient reactions to various forms of treatment and use the information to select treatment options for their own patients.

While many agree this approach could improve care through greater information sharing, the jury is still out on whether it will actually lower healthcare costs. A RAND Corporation study suggested that the system could save lives, prevent medical errors and save as much as $80 billion per year.

But does the reality justify that figure? Should the PHIA become law, the incentive payments would pick up part of the tab for the new technology. But the payments are to be phased out in several years, and it is not clear where the funds to maintain the infrastructure will come from.

Currently, only about 20 percent of physicians use any form of electronic health record. Eighty percent of the nation's health records are in bulging manila folders in doctors' offices across the nation. The opportunity to digitize that paper mountain is attracting some big names. Microsoft, IBM and General Electric are all jockeying for position in the new age of health record digitization.

The promise, however, is only one side of the coin. Privacy advocates have voiced fears over having the nation's medical files online waiting to be hacked. Although every bill before Congress complies with the Health Insurance Portability and Accountability Act's (HIPAA) privacy requirements, the data's vulnerability remains in question. The personal data would be a gold mine for marketers, identity thieves and other con artists.

In theory, digitization would bring more information to doctors and their patients. For example, the Veterans Administration has used patient data to adapt generic drug dosages to largely replicate the performance of their name-brand competitors. This has resulted in similar health outcomes at far lower costs.

Digitization could also enhance research by allowing access to all those records. Advocates say that doctors could access impartial studies pulled from patient data to determine treatment effectiveness. Having that data on hand would allow physicians to filter through drug company marketing hype and pharmaceutical company-backed studies.

Will health record digitization usher in a golden era of patient health? Maybe, but clearly it can provide efficiencies that if exploited can yield a healthier nation. That should help lower costs eventually. ■

SMART'S PUBLISHING

The information presented and conclusions stated in this newsletter are based solely upon our best judgement and analysis of information sources. It is not guaranteed information and is not necessarily a complete statement of all available data. Website citations are current at time of publication but subject to change. Smart's Publishing does not engage in the solicitation, sale or management of securities or investments, nor does it make any recommendations on securities or investments—and as such it is not, and is not required to be, a NASD registered representative. This material may not be quoted or reproduced in any form, including copy machines or any electronic storage or transmission medium, in whole or in part, without permission from the publisher. All rights reserved. ©2007 Smart's Publishing. 866-762-7879 (sales), 877-762-7877 (service) • www.smartspublishing.com

Debit Cards Spur Use of FSAs

Debit cards make flexible savings accounts even easier to use and administer.

Doctors will never know the difference. Several large employers, including Ford Motor Company, have started issuing debit cards to their employees linked to their flexible spending accounts (FSAs). When employees pay their doctors and dentists, the medical professionals see just another credit card. But instead of debiting a checking account, the money comes from the employee's flexible spending account.

Plan participants can use FSA debit cards for office co-pays, prescription drugs, and other eligible medical expenses. The cards help employees get the most out of their FSAs by letting them log on to a secure Web site to track their medical expenses through the year. Since FSAs are use it or lose it propositions, employees can see how much they're spending from their FSA account and plan their medical expenses accordingly.

Recently, the IRS loosened rules to allow employees 15 months to spend FSA funds. Funds left in the account at the end of the period revert to the employer.

Employers have found that FSAs have a greater appeal when a debit card is attached. According to the consulting firm WageWorks, one in eight employees normally opts for an FSA, but attach a debit card and the figure is closer to one in four. Since employees contribute pre-tax dollars to an FSA, employers and employees save the payroll tax they would otherwise have to pay.

Similarly, health savings accounts (HSAs) can be linked to debit cards as well. Unlike the FSAs, HSA funds roll over from year to year. HSAs must be linked to high-deductible health plans, which means higher out-of-pocket expenses. Debit cards are a convenient way to pay qualified medical bills without the inconvenience of paying the bill and submitting it for reimbursement from the HSA.

The FSA and HSA debit cards do not carry all the theft and fraud protections that regular debit and credit cards have. But since the cards can only be used for specific items, the exposure to fraud is minimal. For more information on linking your company's FSA or HSA to a debit card, please call us.

Managing Asthma Claims

Asthma is the sixth most common chronic disease among Americans. Disease management can allow asthma patients to live more normal lives and lower the estimated $4,900 annual asthma costs per patient in treatments and absenteeism. (Source: a 2003 study published in the *Journal of Allergy and Clinical Immunology*.)

According to The American Association of Health Insurance Plans' publication *Taking on Asthma: A Resource Guide for Health Insurance Plans,* asthma management has four components:

- **Assessment and monitoring: Includes diagnosis, determination of asthma severity, establishment of follow-up care routine and referrals for specialty care;**
- **Control of factors contributing to severity: Consists of measures to control asthma triggers, along with treatments or preventions of comorbid conditions;**
- **Pharmacotherapy: Prescribing of medications according to severity; and**
- **Patient education: Education on self-management and development of a written asthma management plan by doctor and patient.**

Sentara Health Management in Virginia Beach, Va. used this type of disease management plan for asthma from 1997 to 2002. Using life coaches and patient education, the plan reduced inpatient admissions by 64 percent, emergency room visits by 33 percent, and primary care provider visits by 17 percent.

For more information on disease management programs, please contact us.