Colorado Family Care Act To Go Into Effect

Insights
6.11.13

On May 3, 2013, Colorado Gov. John Hickenlooper signed into law the new Family Care Act (FCA). The law attempts to broaden the qualifying reasons for employee leave under the federal Family and Medical Leave Act (FMLA).

Specifically, the FCA provides that, in addition to the leave that an employee is entitled to the under the FMLA, an eligible Colorado employee is now also entitled to up to 12 weeks of unpaid leave in a 12-month period to care for a person with a serious health condition who is the employee's partner via a civil union under Colorado's newly-enacted civil union law, or the employee's domestic partner as registered in the employee's residential municipality or as recognized by the employer.

The law will go into effect on August 7, 2013 (90 days after the General Assembly adjourned on May 8), unless a referendum petition is filed before that date. If such a petition is filed, the law will be placed on the November, 2014 general election ballot.

What's In The Bill
At first glance, this law seems to be fairly straightforward, a rational attempt by the General Assembly to extend FMLA leave to Colorado's same-sex couples united by Colorado's civil union or domestic partnership laws. But a deeper look into some technical aspects of the law's language exposes problems for employers.

First, the law's preamble, stating that it is "concerning the expansion of the group of family members for whom Colorado employees are entitled to take leave from work under the federal Family and Medical Leave Act of 1993," indicates it is attempting to expand *federal* FMLA leave. This conclusion is supported by the provision stating, "*in addition* to the leave to which an employee is entitled under the FMLA, an employee in this state is entitled to *FMLA leave* to care for a person who has a serious health condition . . . ."

Colorado does not otherwise have a state Family and Medical Leave Act that such leave could be tacked on to. This leaves readers to conclude that the FCA is meant to expand the federal FMLA. Of course, under the principles of federalism and supremacy, Colorado cannot amend the federal FMLA. But even more than that, as explained below, Colorado cannot create leave based on qualifications not present in the FMLA and then legislate that such leave will run concurrent with the federal law.

The federal FMLA allows employees up to 12 weeks of unpaid leave in a 12-month period for a number of qualifying reasons. One of those qualifying reasons is "in order to care for [the employee's] spouse, or a son, daughter, or parent . . . if such spouse, son, daughter, or parent has a serious health condition."

But when a state enacts leave laws that provide qualifying reasons beyond those of the FMLA, such as allowing a state's employees to take leave to care for relatives other than a spouse, son, daughter, or parent, Labor Department regulations state that "nothing in FMLA supersedes any provision of state or local law that provides *greater* family or medical leave rights than those provided by FMLA."

Thus, an employee's state-law-leave based on a qualifying reason not allowed for under the FMLA is taken in *addition* to FMLA leave. Putting it another way, a Colorado employee who takes leave to care for a same-sex partner under the FCA takes that leave *in addition* to any leave allowed under the FMLA, giving that employee the potential to "double dip," and take up to 24 weeks of unpaid leave to care for relatives with serious health conditions.

The Source Of Confusion

In the wake of the FCA's enactment, some legal commentators have noted that the "double dip" potential only exists if FCA leave is taken first. They argue that if FMLA leave is taken first, the FCA leave will run concurrently with the FMLA leave, and double-dipping will not be possible. This argument seems to be based on the law's "concurrent" language, plus the provision that states, "this section does not increase the total amount of leave to which an employee is entitled during a twelve-month period under the FMLA, this section, or both."

Yet, the Labor Department's regulations tell us that FMLA leave and broader state leave cannot run concurrently regardless of the order in which leave is taken. In the provided examples, the DOL regulations state:

> If State law provides six weeks of leave, which may include leave to care for a seriously-ill grandparent or a "spouse equivalent," and leave was used for that purpose, the employee is still entitled to his or her full FMLA leave entitlement, as the leave used was provided for a purpose not covered by FMLA. If FMLA leave is used first for a purpose *also* provided under State law, and State leave has thereby been exhausted, the employer would not be required to provide additional leave to care for the grandparent or "spouse equivalent."

Accordingly, if FMLA leave is used first for a purpose *not* provided under state law, state leave is *not* exhausted. The only way state leave and federal FMLA leave run concurrently is if the leave qualifies under both laws. FCA leave cannot run concurrently with FMLA leave in any circumstance; the qualifying reasons do not overlap. Consequently, the FCA creates an additional 12 weeks of leave per 12-month period, no matter the order in which leave is taken.

Our Advice

Because the Colorado General Assembly does not have the authority to expand the FMLA and

Because the Colorado General Assembly does not have the authority to expand the FMLA and because the leave provided under each statute cannot run concurrently, the FCA functions as a narrow, specific leave entitlement under Colorado law. In administering such leave, employers should utilize the following practical points:

1. Do not count FCA leave against an employee's FMLA leave entitlement, or vice versa.
2. Do not call the leave "FMLA leave." Modify your documents to show the leave is under the Colorado FCA. This will keep the types of leave separate and avoid confusion.
3. Require the documents allowed under the state law to confirm that your employee is in a civil union or domestic partnership with the person for whose care the leave is taken. This will help prevent fraudulent use of FCA leave.
4. Remember: while you can pay an exempt employee who takes intermittent/reduced schedule FMLA leave on an hourly basis without jeopardizing the exemption, doing so under the FCA *will* jeopardize the exemption.

For more information about how this new law could affect your operations, contact any attorney in the Denver office of Fisher Phillips at (303) 218-3650.

This Legal Alert provides an overview of a specific state law. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.