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Employers and sick leave: An overview

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By Peg O'Brien

Are businesses in New Hampshire required to provide sick leave for employees? The short answer is "maybe."

With recent news reports regarding "mandatory sick leave" legislation and ongoing "guidance" from federal agencies for handling the H1N1 virus in the workplace, it is a good time to clarify the applicable law.

FMLA: Under the Family and Medical Leave Act, a covered employer may be required to permit up to 12 weeks of leave for illness that constitutes a "serious health condition." A serious health condition is defined as one that involves either hospitalization or "continuing treatment" by a health-care provider for incapacitation lasting at least three consecutive days.

An eligible employee also may be entitled to FMLA leave to care for an immediate family member (parent, child, spouse) if the family member's illness qualifies as a "serious health condition." The leave can be up to 26 weeks if the family member became ill or injured while in military service. FMLA leave is unpaid. However, employers can design their FMLA policy to run concurrent with any voluntary paid sick leave plans they may offer.

Voluntary sick leave plans: If an employer in New Hampshire voluntarily opts to provide sick leave, then certain laws must be followed. Written notice must be provided to employees of the employer's practices with regard to leave. The notice may be posted in the workplace or given to employees in writing, usually as part of an offer letter or handbook. The notice must clearly describe how the employees earn leave and how the leave can be used.

Employers have the option to allow or prohibit employees from carrying unused sick leave forward from one year to the next. Employers also may decide whether or not (or under what conditions) to "cash out" unused sick leave upon separation from employment. If an employer decides to pay employees for unused sick leave at year end or upon separation from employment, the "cash out" must be treated in the same manner as all other wages due to an employee. New Hampshire law requires that an employee involuntarily separated from employment must be paid all wages due within 72 hours of termination. If the employee voluntarily leaves employment, final wages must be paid in the next regular pay cycle.

Deductions from salaried employees' paychecks for sick leave: When a salaried employee is absent from work due to illness, federal and state law significantly limits the right of employers to make deductions from the employee's paycheck for the time this employee misses from work.

In general, the rule of thumb is that such deductions are impermissible, with limited exceptions, most notably when a salaried employee performs no work in a given pay period or the employee is absent pursuant to FMLA. Violations of this law can lead to significant and costly penalties.

ADA and OSHA considerations: While not expressly requiring employers to provide employees with time off from work due to illness, the federal Americans with Disabilities Act (ADA) and the New Hampshire Law Against Discrimination (modeled on the ADA) may impose such a requirement if the employee's condition qualifies as a covered disability.

Under the laws, if an employee's illness qualifies as a disability, and the employee is capable of performing his or her job with reasonable accommodations provided by the employer, then it is impermissible to discriminate against that employee. Reasonable accommodations could include providing employees with a medical leave of absence to allow the employee to regain work capacity or stabilize his or her medical condition.

Employers should be mindful that the federal occupational safety and health law imposes a general duty on employers to provide a safe and healthy workplace

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that "is free from recognized hazards that are causing or are likely to cause death or serious physical harm." Insisting that an employee with a contagious illness come to work could be considered a violation of this general duty, in that it could be detrimental to the health of the employee and other workers.

To date, the Occupational Safety and Health Administration has not issued any rules mandating that employers provide employees with sick leave, but guidance published by OSHA and the Centers for Disease Control strongly encourage employers to permit employee absences due to the flu without any disciplinary consequences.

Pending legislation on mandatory sick leaves: Both state and federal lawmakers have taken up the issue of mandatory sick leave.

The state legislation, House Bill 662, would require all employers with 10 or more employees to provide a paid sick leave benefit. Employees would be permitted to accrue up to 40 hours of sick leave, unless the employer elects to allow a greater accrual. Importantly, however, this proposed state law would not apply to employers that already have paid leave policies that meet the requirements of the law. However, those employers for whom paid leave accrual systems are not the norm would be required to establish a new benefit program.

Congress also is considering several bills that would require covered employers to provide at least five paid sick days to employees suffering from a "contagious" illness, such as H1N1. Most of these bills apply to employers with 15 or more employees, and permit eligible employees to stay home either voluntarily or at the direction of their employer because of a contagious illness.

If covered by the law, the employee could not be fired, disciplined or otherwise retaliated against for his or her absence. These bills are currently pending in committee hearings with no clear date for a vote.

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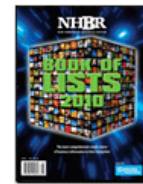
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