TEN FMLA PITFALLS AND PERILS FOR 2014

While many employers have been focused on the fast approaching implementation of the Employer Shared Responsibility mandate under the Patient Protection and Affordable Care Act (“PPACA”), other laws and regulations affecting employer-sponsored health benefits continue to have a major impact on the day-to-day administration of employee benefits. In particular, special attention must still be paid to the Family and Medical Leave Act (“FMLA”) \(^1\) which has been expanded in both scope and complexity during the past few years. However, employers must be cognizant that, FMLA administration cannot occur in a vacuum. Not only must employers comply with the FMLA requirements, but also the rules relating to changes in status under the cafeteria plan rules, the COBRA terms included within insurance contracts, and the Americans with Disabilities Act, among other requirements. This intersection of requirements and obligations creates the potential for a number of pitfalls and perils for employers who are attempting to administer a compliant FMLA program. Will your organization be able to chart a safe course to avoid the Ten FMLA Pitfalls and Perils for 2014?

1. **Failing to get the scuttlebutt on new guidance.** In early 2013, the Department of Labor (the “DOL”) issued guidance on the definition of a “son” or “daughter” as those terms relate to an individual 18 years of age or older and incapable of self-care because of a mental or physical disability. Subsequently, the DOL issued final regulations implementing portions of NDAA 2010, which expanded qualifying exigency and military caregiver leaves, and released new model forms. Later that year, the DOL also issued guidance on the definition of a “spouse” under FMLA in light of the *Windsor* decision. And, according to the DOL’s 2014 regulatory agenda, the DOL intends to issue additional guidance on the definition of “spouse” under FMLA. Is your organization prepared to digest the scuttlebutt created by the swell of guidance?

2. **Lacking cafeteria plan provisions to permit employee payment options for unpaid leave.** Employees on FMLA leave cannot be charged more than active employees for the same health coverage. During paid FMLA leave, premiums for coverage must be made on the same basis as if the employee were not on leave. However, for employees on unpaid FMLA leave, they may pay for coverage in one of three ways: “prepay,” “pay-as-you-go,” and “catch-up.” A cafeteria plan may offer one or more of these options, but certain limitations apply, and any payment options offered to employees on non-FMLA leave must also be offered to employees on FMLA leave. Under the prepay option, the employee may pay, before commencing FMLA leave, the contributions that will be due during the leave period, but an employer cannot mandate that an employee prepay. Under the pay-as-you-go option, an employee pays his or her share of the cost of coverage during the leave in installments. Under the catch-up option, the employer and employee agree in advance that the employer will pay the employee’s share of the cost of coverage during the leave and that the employee will repay those amounts to the employer when he or she returns from the leave, through special catch-up salary reduction contributions. If payments are to be made through a cafeteria plan, employers and plan administrators should make certain that the payment options offered are permitted under the cafeteria plan documents and contain specific provisions related to the permissible methods. In addition, a cafeteria plan that otherwise requires premium payments to be made in equal amounts each month must be amended to permit other amounts to be chosen.

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\(^1\) FMLA applies to private-sector employers with 50 or more employees in 20 or more workweeks in the current or preceding calendar year. It also applies to all public agencies, including state, local and federal employers, and local education agencies (e.g., school districts).
under the prepay and catch-up methods. Are your organization’s cafeteria plan documents ship-shape for employee payment methods during unpaid FMLA leave?

The Pitfalls & Perils for 2014 from our Compliance team is available exclusively through Gallagher and is part of our consultative approach to supporting your organization’s growth, success, and prosperity. To receive the complete installment of the Ten FMLA Pitfalls & Perils for 2014, contact your Gallagher advisor today or click here to Contact Us via AJG.com.

Discover how we can help you rise to the challenge of the ever-changing regulatory environment. We’ll help you chart a course for the future that minimizes compliance burdens and helps you avoid the risks and costs of noncompliance.

The intent of this analysis is to provide you with general information. It does not necessarily fully address all your organization’s specific issues. It should not be construed as, nor is it intended to provide, legal advice. Questions regarding specific issues should be addressed by your organization’s general counsel or an attorney who specializes in this practice area.