

classes of employees might need to be increased to help subsidize projected costs of compliance with the Act.

The policy should be explicit. The definition of family leave must be clear, as must the duration and forms of family leave available to employees. The policy should include a description of any steps that must be taken to apply for a leave as well as any obligations the employee has while on leave. Any continuation of benefits should be described. Finally, the policy should outline exactly how the employee will return to the workforce. If any provisions might be made for a part-time transition period, such provisions should be made clear for all eligible employees.

As the benefits package is realigned, any conflicting statements should be revised or eliminated. For example, employers might have statements to the effect that pregnant em-

ployees are to be allowed time off after childbirth consistent with the ability of employees to obtain time away for other temporary disabilities (consistent with the Pregnancy Discrimination Act enacted in 1978). In light of the new requirement that either parent be allowed up to 12 weeks of unpaid leave in the event of childbirth, the previous statements might be revised to include new provisions or might be eliminated. Your organization's legal department should review the policy to ensure it is nondiscriminatory.

### MAXIMIZING PRODUCTIVITY

**T**raining supervisory personnel is key. Managers and direct-line supervisors must be informed of the policy's new guidelines. Organizations should consider rewarding managers who are creative in maximizing pro-

ductivity while complying with the guidelines and accommodating employees' needs.

Managers should be trained to manage according to results, not the number of hours employees spend on the premises. Because of potential problems with scheduling and delegating work, cross-training should be encouraged. A good accounting and human resources system should be developed to analyze performance and make scheduling decisions.

Many employees will not take advantage of these benefits because of fears they will be overlooked when salary raises and promotions are awarded. Managers should be able to address such concerns.

Managers also must be aware of potential abuses. Employees might take days off for reasons not covered under the Act, such as to search for a new job

## MORE ON THE FAMILY

BY STEVEN MITCHELL SACK

**A** major concern faced by pregnant workers has been the ability to get their jobs back after giving birth. The Family and Medical Leave Act will alleviate this concern for the millions of employees working for companies with 50 or more employees who desire job-protected leave.

The Act affects private and nonprofit employers as well as federal, state, and local government employees. Because companies with fewer than 50 employees are exempt, analyzing who must be counted becomes important for organizations close to the "magic" 50 number. Experts predict that some companies who employ approximately 50 workers might terminate a few to avoid the law's requirements and burdens. However, it is possible to maintain a sufficient workforce and still be exempt from the law's impact by hiring temporary, contract employees, or part-time workers who work 25 or fewer hours a week.

According to the Act, if a worker claims a serious health situation, the employer is entitled to receive medical opinions and certifications regarding the need for a leave. The certification must state the date on which the serious health condition began, its probable duration, the appropriate medical facts within the knowledge of the health care provider regarding the condition, and an estimate of the amount of time the employee needs to care for a family member or himself. If an employer has doubts about the certification, it may require a second opinion from a different health care provider chosen by the employer. If both opinions differ, a third opinion from a provider jointly designated or approved by the employer and employee will be final and binding.

A key element of the law allows a person taking leave to be restored to his or her position or to an *equivalent* position, with *equivalent* benefits, pay, and other terms and conditions of employment upon returning from the leave. The burden is on the employer to give the worker back the same or equivalent job. This differs from a comparable or similar job wher-

ever possible. Also, no employer may deprive an employee of benefits accrued before the date on which the leave commenced. On the other hand, if the employer was about to lay off the worker just before being notified of the leave, the employee's right of reinstatement is no greater than what it was when the layoff occurred.

During the time the worker is on leave, an employer is not required to pay the worker but is required to maintain health insurance benefits at the level and under the conditions coverage would have been if the employee had continued working at the company. Nothing requires an employer to provide health benefits if it does not do so at the time the employee commences leave. If the employer establishes a health plan for employees, it must provide health benefits to employees on leave as well. But an employer has the authority to demand repayment for the group health care premiums it paid during the leave if the employee fails to return to work after the period of leave has expired. The employer cannot ask for repayment if the employee does not return due to a recurrence or onset of a serious health condition or other circumstances beyond his or her control. Also, workers on leave cannot collect unemployment or other government compensation.

### STAFFING FLEXIBILITY

**C**ompanies need to be aware of numerous exceptions in the Act. First, an eligible employee may elect, or an employer is permitted, to substitute any accrued paid vacation leave, personal leave, or family leave of the employee for any part of the 12-week period of family leave. Companies with pre-established policies documented in employee manuals need now only provide both paid and unpaid leave up to a total of 12 weeks. Many companies will be able to avoid problems by transferring existing personnel, hiring temporary workers, and working out job-sharing arrangements to fill vacancies. Also, the Act gives employers the right to count time off against paid vacation days or other



or for leisure activities. Thus, managers should require documentation for medical leave requests and track days taken by individuals to determine unusual patterns of leave.

Data should be gathered concerning projected costs, employee needs, productivity loss, and any projected saving that might result from the assignment of work to other employees. Top management should not oversell any projected benefits without sufficient data to support the projections. Once the policy is in force, qualitative and quantitative information should be gathered to aid in making future assignments. The following statistics should be tracked regularly.

- Number of women taking pregnancy disability leave,
- Number of women and men taking parental or elder care leave,

- Number of women and men taking leave for personal medical reasons,
- Average duration of leave by type,
- Level and performance rating of leave takers,
- Number of women and men returning from leave, and
- Turnover rates for leave takers versus those who do not take leave.

Your organization may want to be alert to any morale problems when employees fill in for employees absent on leave. Also, employees taking a family leave should be interviewed by the organization about their expectations versus their actual experiences with the leave and transition back into the workforce.

With so many dual career couples, single parents, and adults providing elder care for parents, a family benefits package has been called the most im-

portant employee benefit of the 1990s. We believe that cultivating a culture that accommodates the needs of employees will encourage outstanding workers to join and remain with an organization. ■

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## AND MEDICAL LEAVE ACT

accrued personal leave.

Generally the leave requested may not be an intermittent or reduced schedule without the employer's permission or when medically necessary. Employers are permitted to require an employee to prove the medical necessity for the leave and to transfer the employee temporarily to an equivalent alternative position. Thus, employers have greater staffing flexibility.

Key employees who take family leave are still eligible for continuation of health benefits, even if the employee has been notified that reinstatement will be denied. Under such circumstances, no recovery of premiums may be made by the employer if a key employee has chosen to take or to continue leave after receiving such notice.

### CAUTION ADVISED

**T**he secretary of labor has the authority to investigate alleged violations. This includes requesting employers to submit their books and records for inspection. Violations are punishable by injunctive and monetary relief.

For employers who violate the law, monetary damages include an amount equal to the wages, salary, employment benefits, or other compensation denied or lost to an employee. In cases where no compensation or wages are lost, the law imposes other forms of damages, such as the actual amount of out-of-pocket money incurred in paying someone else to provide care. Interest on any judgment is permitted. In the event a willful violation is proved, employers are liable for additional damages equal to the amount of the award.

A court has the discretion to award no liquidated damages when an employer proves any act of omission was made in good faith and there were reasonable grounds to believe it was not acting improperly. This might occur, for example, after receiving a lawyer's written opinion that the company was not violating the law after being notified by an employee that a violation was, in fact, being committed. Thus, it is important to request and save all favorable written opinions

from counsel. The law also imposes reasonable attorney fees, expert witness fees, and other costs and disbursements.

No interim rules or cases have yet been published to help simplify the Act's provisions. Therefore, employers must proceed cautiously in this area and speak to legal counsel for pertinent information.

Employers are forbidden to discriminate against workers who attempt to use the Act or who protest alleged violations. Similarly it is unlawful to discharge or reduce the benefits of any worker because he or she filed a charge or instituted a proceeding concerning the law or is about to give (or has given) testimony regarding the Act.

Most important, in the event your state law is more comprehensive or offers greater benefits to workers than the federal law, the state law is not pre-empted by the federal legislation. Consequently, state or local laws that provide greater employee protection, longer leave periods, or paid leave will predominate.

For example, in Oregon, 12 weeks of parental leave is provided to workers in companies with 25 or more employees. Thus, Oregon's law would apply to smaller companies.

Finally, the Act cannot take away rights granted to employees in collective bargaining agreements, pension plans, ERISA rights, or rights granted as a result of the Americans with Disabilities Act and other discrimination laws. ■

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This article was excerpted from Mr. Sack's new work, *The Hiring & Firing Book: A Complete Legal Guide for Employers*. This comprehensive 390-page book includes sample forms, employment agreements, releases, and checklists. It is available to IMA members at a reduced rate of \$132, which includes postage and handling and sales tax. To order, call 1-800-255-2665 or send a check to Legal Strategies Inc., 1795 Harvard Avenue, Merrick, NY 11566.

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