AN OVERVIEW OF THE FAMILY AND MEDICAL LEAVE ACT

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NOTE: These guidelines are general in nature and should not be construed as providing legal advice. The circumstances of any particular problem are important in analyzing legal issues, and an employer seeking guidance for a particular question should seek specific legal advice.

INDEX

1. An overview of the FMLA.

The Family and Medical Leave Act requires that covered employers provide eligible employees with up to 12 weeks of unpaid, job-protected leave each year for the birth of a child or the placement of a child for adoption or foster care; to care for an immediate family member (spouse, child, or parent) with a serious health condition; or because the employee is unable to work because of the employee's own serious health condition.

Under some circumstances, employees may take FMLA leave intermittently, in blocks of time rather than all at once. Also, under some circumstances, employees may reduce their

normal work week or daily work schedule, or may miss full days of work on an intermittent basis.

Under most circumstances, upon return from FMLA leave, an employee must be restored to his/her original position or an equivalent position with equal pay, benefits, and other equal employment terms and conditions.

When the need is foreseeable, employees seeking to use FMLA leave may be required to provide the employer with a 30-day advance notice of his/her need to take the leave. When the leave is not foreseeable, the employee must provide notice of the need for leave to the employer as soon as practicable under the facts and circumstances of the particular case.

An employer may require that the need for medical leave be certified by the health care provider of the employee or the employee's child, spouse, or parent. The Act and regulations contain provisions that permit the employer, under some circumstances, to obtain second and third medical opinions at the employer's expense and, if warranted, periodic re-certifications.

All covered employers must prepare, maintain, and preserve records pertaining to compliance with the FMLA and submit the records for inspection if requested by the Department of Labor. Further, covered employers must post a notice approved by the Secretary of Labor which explains the employee's rights and responsibilities under the Act.

Employees or the Secretary of Labor may bring civil actions against an employer for violations of the Act. Employees can recover lost wages and benefits. Employees can also seek reinstatement, promotion, or other equitable relief. The Department of Labor may resolve complaints from employees against an employer through the Department's administrative process or may sue for damages on behalf of the employees whose rights have been violated.

2. Who is a covered employer.

Under the FMLA, an employer engaged in commerce or in an activity affecting commerce is covered by the Act if 50 or more employees are employed in at least 20 or more calendar work weeks in the current or preceding calendar year. Employers covered by the FMLA also include any person acting, directly or indirectly, in the interest of a covered employer, any successor in interest of a covered employer, and any public agency. Public agencies, public schools, and private elementary and secondary schools are considered to be covered employers without regard to the number of employees employed. Generally, the legal entity employing the employee is the covered employer under the FMLA. Normally, a corporation is considered to be a single employer.

For the purpose of determining an employer's number of employees, any employee on the employer's payroll is considered employed each working day and is counted whether or not compensation is received for a particular week. Further, employees on paid or unpaid leave, leave of absence, disciplinary suspensions, etc., are also counted as long as the employer has a reasonable expectation that the employee is returning to work. Once the employer meets the 50 employees/20 work weeks threshold, the employer continues to be covered under the Act until such time as it has no longer employed 50 employees for 20 non-consecutive work weeks in the current and preceding calendar year.

3. Who are eligible employees?

An employee is eligible to take leave under the FMLA if he or she is an employee of a covered employer who:

(1) has been employed by the employer for at least 12 months, and;

(2) has been employed at least 1,250 hours during the 12 month period immediately preceding the leave, and;

(3) is employed at a work site where 50 or more employees are employed by the covered employer within 75 miles of that work site.

The 12 month period the employee must have been employed need not be 12 consecutive months of employment. If an employee is on the payroll for any part of the week, including sick or vacation time or unpaid leave, during which other benefits are provided (such as workers' compensation or group health benefits), the week counts toward the 12 months of employment.

Under the FMLA, covered employers are required to provide eligible employees with up to 12 weeks of unpaid job-protected leave each year for the specified family and medical reasons set forth in the Act.

4. Events which qualify for leave under the Act.

(a) Birth and care of employee's child.

Under the FMLA, an employee's entitlement to leave for the birth of a child begins on the date of the child's birth, and ends 12 months thereafter, unless state law permits otherwise. Any FMLA leave for the birth and care of the employee's child must conclude within this one-year period. A father as well as a mother may take leave for the birth of a child. A husband and wife employed by the same employer may be limited to a combined total 12 weeks of leave during the 12 month period of entitlement.

(b) Placement of a child with employee for adoption or foster care.

An employee's entitlement to leave after placement of a child through adoption or pursuant to foster care begins on the date of placement and ends 12 months thereafter, unless state law permits otherwise. Under the Act, foster care is defined as 24-hour care for children in substitution for, and away from, their parents or guardian. Such placement is made by or with the agreement of the state. Employers are required to grant FMLA leave before the actual placement or adoption of a child if such absence is required for the adoption or foster care to proceed. For example, employees may obtain leave to attend counseling, to make court appearances, or to consult with physicians or attorneys. Either or both foster or adoptive parents may take leave for placement or adoption of a child.

Leave taken for birth of a child or adoption or foster placement of a child may not be taken by the employee intermittently or on a reduced leave schedule unless the employer and the employee agree otherwise.

(c) Care of spouse, parent, or child of employee with a serious health condition.

For purposes of the Act, spouse means husband or wife as defined under state law and includes common law marriage if recognized in the state where the employee resides. Parent means a biological parent or someone who stands or stood in loco parentis to the employee. In-laws are not included in this definition.

The term "needed to care for" is interpreted to mean that the employee is needed to care for a family member in need of either physical or psychological care. For example, the term covers a family member who, due to a serious health condition, is unable to care for his/her own medical, hygienic, nutritional or safety needs, including a family member who is unable to

transport himself/herself to the doctor. The term also includes providing psychological support to a family member with a serious health condition who is receiving inpatient or home care.

Employees seeking intermittent leave to care for a family member may do so if the intermittent leave is medically necessary. Employees needing intermittent leave must attempt to schedule the leave so as not to disrupt the employer's operations.

(d) Serious health condition of employee which makes the employee unable to perform his/her job

For purposes of FMLA leave, "serious health condition" means an illness, injury, impairment, or physical or mental condition that involves:

* inpatient care (an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity, due to a serious health condition including treatment or recovery, or subsequent treatment in connection with the inpatient care; or

* continuing treatment by a health care provider.

"Continuing treatment by a health care provider" includes the following:

* A period of incapacity (inability to work, attend school, or perform other daily activities due to a serious health condition) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to that condition, that also involves:

  --- treatment two or more times by a health care provider; or

  --- treatment by a health care provider on at least one occasion resulting in continuing treatment under supervision of a health care provider.

* Any period of incapacity due to pregnancy or for pre-natal care.

* Any period of incapacity or treatment due to a chronic serious health condition. A chronic serious health condition is one which:

--- requires visits for treatment by a health care provider, or by another under the supervision of a health care provider;

--- continues over an extended period of time;

--- may cause episodic problems rather than continuing incapacity, such as asthma, diabetes, or epilepsy.

* Continuing treatment also includes a period of incapacity which is permanent or long term due to a condition for which treatment may not be effective, such as Alzheimer's, severe stroke, or the terminal stages of a disease.

* Also included is any period of absence to receive multiple treatments (or any period of recovery therefrom) such as chemotherapy, dialysis, and physical therapy for severe arthritis.

Under the Act, treatment also includes examinations to determine if a serious health condition exists and evaluations of that condition. However, treatment does not include:

* routine physical examinations

* eye or dental examinations

* a regimen of continuing treatment involving over-the-counter medications; or bed rest initiated without a visit to a health care provider

* cosmetic treatments -- unless inpatient stay involved or complications develop

Generally (unless complications develop), the common cold, flu, ear aches, upset stomach, minor ulcers, headaches, routine dental or orthodontic problems, and periodontal disease do not meet the definition of a serious health condition under the Act. However, if such a condition presents itself, consideration should be given as to whether the conditions of a "serious health condition" have been met. For example, an "ulcer" which produces a three day absence may be a "serious health condition," or it may qualify as a chronic condition.

Substance abuse may be a serious health condition, but FMLA leave may only be taken for treatment of substance abuse if provided by a health care provider or on referral by a health care provider. Absence for treatment of substance abuse which rises to the level of a serious health condition is covered. But, absences unrelated to treatment, which are caused by the use of the substance, are not covered.

It is important to note that absences due to incapacity related to pregnancy or prenatal care or due to a chronic serious health condition qualify for FMLA leave even though the employee does not receive care from a health care provider during the absence and even if the absence is under three days. For example, a pregnant employee may be unable to report to work for one day because of severe morning sickness. This is probably covered under the Act. An employee with asthma may be unable to report for work due to an asthma attack. This presumably is also covered under the Act.

Since passage of the Act and promulgation of the Regulations there have been cases decided by courts which address the issue of what constitutes a serious health condition under the FMLA. With the caveat that the courts are reviewing the question of what constitutes a serious health condition under the FMLA according to very fact specific circumstances, the summaries below describe a few of the more significant and interesting decisions.

--- Employee's gastroenteritis and upper respiratory infection did not constitute a serious health condition. Brannon v. Oshkosh B'Gosh, Inc. After a rather in depth analysis the Oshkosh Court decided that although the employee in that case was given three prescriptive drugs, the employee presented no proof that she was incapacitated for more than three calendar days.

--- Employee's absence from work not covered by FMLA because child's ear infection (otitis media) did not qualify as a serious health condition. Seidle v. Provident Mut. Life Ins. Co. The Seidle Court ruled that the child's ear infection for which he received treatment by a physician on one occasion which consisted of a prescription of antibiotics did not meet the definition of continuing treatment by a health care provider. The employee argued that the course of medication met the definition of continuing treatment, but the Court did not accept the employee's argument and concluded that the child did not take the medication under the continuing supervision of the physician. The Court explained that the term continuing treatment or supervision by a health care provider under the FMLA contemplates direct, continuous, and first-hand contact by a health care provider subsequent to the initial out-patient contact.

--- Victorelli v. Shadyside Hospital -- a hospital technician, who had been repeatedly written-up for taking days off called in and said she had an upset stomach. Later she called back and said her doctor said the problem was from her peptic ulcer acting up. A decision was made to terminate her, in part because of this absence. She claimed a violation of the FMLA. The case was dismissed by the district court, but reinstated by the Third Circuit. The appeals court held that the facts alleged might constitute a viable FMLA claim under the regulations, and that the ulcer might be a "serious health condition."

--- Employee's illness caused by a case of chicken pox constituted a serious health condition under the FMLA. George v. Associated Stationers. The employer argued that the Act was meant to cover only those employees with chronic or debilitating conditions. The Court rejected the employer's interpretation and concluded that the employee's illness met the definition of a serious health condition because the employee had two treatments by a physician, was told by his physician he could not work until the chicken pox vesicles were covered (a period of more than 3 days) and was contagious for a period of time. The Court explained that this was a situation different from that of a employee suffering from an ear ache or cold.

--- Employee's condition of "rectal bleeding" for which he sought no medical attention, did not qualify as a serious health condition. Bauer v. Dayton-Walther Corp. In Bauer the Court concluded that the fact that the employee's condition could have turned out to be something as serious as rectal cancer or as relatively insignificant as hemorrhoids is speculative and irrelevant. The Court explained that the condition at issue "must be taken for what it was during the relevant time period, and not for what it could have become." Id. at 310.

The above cases demonstrate that one can simply not look to the label of a disease or employee health problem to determine whether or not a particular disease or problem constitutes a serious health condition under the FMLA. Rather, each situation must be examined to determine if the employee's health condition in view of the language of the Act and Regulations to determine if a particular condition for which the employee is absent from work constitutes a serious health condition.

Under the Act, the employer is required only to provide unpaid leave for an eligible employee. However, an employer may require an employee to use paid leave, including vacation or sick leave, concurrently with unpaid FMLA leave. If this approach is used, the paid leave will run concurrent with the FMLA leave, and be counted against it. If the employer does not have this requirement, the employee may elect to use paid leave for part of the FMLA leave.

An employee is required to provide the employer at least 30 days advance notice before leave under the FMLA is to begin if the leave is foreseeable, based on events such as an expected birth, placement for adoption or foster care, or planned medical treatment. If 30 days notice is not possible, the employee must provide notice as soon as practicable. This ordinarily means at least verbal notification to the employer within one or two business days of when the employee knows of the need for the leave.

When the need for FMLA leave is not foreseeable, an employee should give notice to the employer of the need for leave as soon as practicable under the circumstances. The employee is expected to give notice within one or two working days of learning of the need for leave except in extraordinary circumstances. Notice may be given by an employee's spokesperson, for example, a spouse or parent, if the employee is unable to give notice personally.

There are consequences if employees fail to provide the required notice to employers. If an employee fails to give 30 days notice for foreseeable leave without a reasonable excuse for the delay, the employer may delay the leave until at least 30 days after the date the employee gives notice.

However, for the employer to delay the leave, it must be clear that the employee knew of the FMLA notice requirements. Proper posting of the required notice at the work site would satisfy the employer's responsibility.

Employees are required to notify employers of the need for FMLA leave. Employees are required to identify the event that qualifies for FMLA leave, the need for leave, and the anticipated timing and duration of leave. However, employees need not mention the FMLA by name.

An employer may require that the need for medical leave be certified by the health care provider of the employee or employee's child, spouse, or parent. An employer must give notice to the employee of the requirement for medical certification. When the leave is foreseeable and at least 30 days notice has been provided, the employee should provide the certification before the leave begins. If this is not possible, the employee must provide the certification within the

time requested by the employer (who must allow at least 15 days after the employee's request) unless not practicable for the employee to provide the certification under the circumstances.

Generally, the employer should request that an employee furnish certification at the time the employee gives notice of the leave or within two business days thereafter, or in the case of unforeseeable leave, within two business days after the leave begins. If the employer finds the certification incomplete, the employer must so advise the employee and provide time for the employee to cure the deficiency. Further, if the employer's leave plan provides for less stringent medical certification requirements than those under the FMLA, and the employee is substituting paid leave for FMLA leave, only the employer's less stringent requirements can be imposed.

The Department of Labor has developed a form which may be used by employers to obtain medical certification meeting the FMLA requirements. The employer may utilize the Department of Labor form or its own form, however, no additional information beyond that contained in the Department of Labor's form can be required by the employer.

Under some circumstances, an employer may request subsequent medical certifications. For example, for pregnancy, chronic or permanent/long-term conditions under continuing supervision of a health care provider, an employer may request re-certification every 30 days, unless circumstances change. One example of changing circumstances would be if the employer receives information which casts doubt on the employee's stated reason for the leave. If the employee fails to satisfy the medical certification requirements, in the case of foreseeable leave, an employer may delay the taking of the leave until the certification is provided.

When the need for leave is not foreseeable, an employee must provide certification within the time frame requested by the employer or as soon as possible under the circumstances. The employee must be given at least 15 days after the employer's request. In the case of a medical

emergency, it may not be practicable for the employee to meet the 15 calendar day requirement. Generally, if an employee fails to provide the certification within a reasonable time under the circumstances, the employer may delay the continuation of the leave. In the event an employee fails to provide the medical certification when requested to do so, the employer may treat the leave as not qualifying for FMLA protection.

On return from FMLA leave, an employee is entitled to return to the same position the employee held when leave began, or to an equivalent position with the same pay, benefits, and other conditions of employment. The employee is entitled to this reinstatement even if another employee has taken the employee's place during his/her absence.

Upon the employee's return from leave, if the employee cannot perform an essential function of the job due to a physical/mental condition, including a continuation of a serious health condition, the employee does not have a right to job restoration or to another position under the FMLA. But, the employer must be sure to consider the applicability of the Americans with Disabilities Act.

In the event an employee on workers' compensation absence due to a job-related injury or illness also qualifies for FMLA leave due to a serious health condition under the Act, the employer must consider FMLA entitlement when such an employee is able to return to work in a light-duty or modified-duty capacity. In the event such an employee is offered a light/modified-duty position, under the FMLA, the employee is not required to accept the position and return to work. Such a refusal may disqualify an employee for future workers' compensation benefits, however, the employee is entitled to continue on unpaid FMLA leave either until the employee is able to return to his/her previous job or an equivalent job or until the 12 weeks of FMLA leave entitlement is exhausted.

There are exceptions to the job restoration requirements under the Act. For example, if the employee would have been laid off during FMLA leave, the employee is not entitled to job restoration. However, the employer has the burden of proving that the employee would have been laid off.

Under limited circumstances, the employer may also deny job restoration to "key employees" under the Act, if such denial is necessary to prevent substantial and grievous economic injury to the employer's operations. A key employee is defined under the Act as a salaried employee among the highest ten percent of all employees employed within 75 miles of the employer's work site.

If there is the possibility that reinstatement may be denied to a key employee, the employer must give written notice to the employee at the time the employee requests leave (or when FMLA leave begins whichever is earlier) that he or she qualifies as a key employee. The employer must also fully inform the employee of potential consequences with respect to reinstatement. The Department of Labor has prepared a prototype notice for the employer to respond to the employee's request for leave which includes the notices required to be provided to key employees.

During any FMLA leave, the employer is required to maintain an employee's coverage under a "group health plan," according to the same conditions of coverage as if the employee had been continuously employed during the FMLA leave period. Thus, any share of group health plan premiums which were paid by the employee prior to FMLA leave must continue to be paid by the employee during leave.

Also, if, under the employer's policies, an employee on leave without pay would be entitled to other employee benefits (other than health care), the same benefits must be provided to an employee on FMLA leave as would be provided to an employee on leave without pay.

The FMLA requires employers to prepare and maintain records pertaining to the employer's obligations under the Act. The regulations do not require the employer to submit records to the Department of Labor, unless specifically requested by a Department official. Unless the Department has a reasonable cause to believe a violation exists, the Department may not require that the employer submit its records more than once during a 12 month period.

The employer is not required to maintain records in a particular form. However, employers must keep records for at least three years.

The records must contain, at least, the following information:

(1) Basic payroll and identifying employee data, including name, address, and occupation; rate or basis of pay and terms of compensation; daily and weekly hours worked per pay period; additions to or deductions from wages; and total compensation paid.

(2) Dates FMLA leave is taken by FMLA eligible employees (e.g., available from time records, requests for leave, etc., if so designated). Leave must be designated in records as FMLA leave; leave so designated may not include leave required under State law or an employer plan which is not also covered by FMLA.

(3) If FMLA leave is taken by eligible employees in increments of less than one full day, the hours of the leave.

(4) Copies of employee notices of leave furnished to the employee under FMLA, if in writing, and copies of all general and specific written notices given to employees as required under FMLA and regulations. Copies may be maintained in employee personnel files.

(5) Any documents (including written and electronic records) describing employee benefits or employer policies and practices regarding the taking of paid and unpaid leaves.

(6) Premium payments of employee benefits.

(7) Records of any dispute between the employer and an eligible employee regarding designation of leave as FMLA leave, including any written statement from the employer or employee of the reasons for the designation and for the disagreement.

It is important to note that records and documents relating to medical certifications, and medical histories of employees or employees' family members created for FMLA purposes, must be maintained as confidential medical records in separate files from the personnel file.

Every covered employer must post and maintain FMLA notices on its premises in conspicuous places where they can be seen by employees and applicants for employment. The notice must be posted even if there are no eligible employees. The notice must explain the Act's provisions and provide information concerning the procedures for filing complaints with the Wage and Hour Division of the Department of Labor.

Employers may duplicate the text of the notice prepared by the Department of Labor. Copies of the notice may be obtained by contacting the local office of the Wage and Hour Division of the Department of Labor. The posted notice must be large enough to be easily read.

If an employer is found to have willfully violated the posting requirement, a penalty of $100 may be assessed for each separate offense. Also, failure to post a notice precludes an employer from denying FMLA leave to the employee for the employee's failure to furnish the employer with advance notice of the need for leave.

If the employer provides written information regarding employee benefits or leave rights, information on FMLA entitlements must also be included in such documents. For example, an employee handbook must explain the FMLA. In the event an employer does not have written

policies or manuals, when an employee requests leave, the employer is required to provide to the employee general written information explaining the employee's rights and obligations under the Act.

An employer must specifically notify an employee when leave is being counted as FMLA leave. The Department of Labor has prepared a "prototype notice" for optional use by the employer to respond to an employee's request for FMLA Leave. Additionally, the employer must provide the employee with specific notice detailing the rights and obligations of the individual employee, along with an explanation of the consequences to the employee of failure to meet his/her obligations. If appropriate, the notice should inform the employee of his/her obligation to furnish the employer with a medical certification for the leave or of his/her status as a key employee. The examples listed above do not include all the notices required to be provided by the employer.

Under the FMLA, covered employers may not interfere with, restrain, or deny the exercise of any right provided by the Act to eligible employees. Employers may not discriminate in any manner against employees who use leave under the Act. An employer cannot use the employee's taking of leave as a factor in making employment decisions, such as promotion or termination. Further, employees cannot waive, nor may employers induce employees to waive their rights under the Act. For example, employees cannot trade off the right to take FMLA leave against some other benefit offered by the employer.

If an employee believes that his/her FMLA rights have been violated, the employee may file a complaint with the Wage and Hour Division of the Department of Labor or file a private lawsuit. Suits must be filed within two years after the last act of the employer which the employee believes constitutes a violation of the Act (or three years in the case of a willful violation).

Depending on the facts in a particular case, an employee may be awarded monetary damages in an amount equal to one or more of the following: lost wages, denied or lost employment benefits, or other denied or lost compensation. Where no such tangible loss has occurred, any actual monetary loss sustained by the employee may be awarded. For example, the employee may be granted an amount equal to the cost of providing care for a seriously ill parent, up to a sum equal to 12 weeks of the employee's wages.

If appropriate, an employee may also receive equitable relief, such as reinstatement or promotion. The award may also include reimbursement for costs and reasonable attorneys fees.

CONCLUSION

The scope of the FMLA can be much broader than it seems. Judicial decisions interpreting the Act have tended to favor employees over employers. The regulations which interpret the Act are not in all respects logical and, at times, result in unlikely conclusions. Terms have been defined so as to be more, rather than less inclusive. Consequently, employers are well advised to seek legal guidance whenever an FMLA issue is encountered. Full awareness of the FMLA's potential breadth can avoid significant future problems and expensive litigation.

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