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EXPERT ANALYSIS

6 Things Employers Must Know About The Family and Medical Leave Act

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The Family and Medical Leave Act, 29 U.S.C.A. § 2601, is hardly new. It has been around now for more than two decades, and it has been used more than 200 million times.[1] Yet this comprehensive federal statute — which imposes significant notice, unpaid-leave, benefit continuation and job restoration obligations on covered employers — is still a source of confusion.

A detailed discussion of the FMLA is beyond this article's scope. FMLA-covered employers nevertheless may benefit from remembering the following six points.

1. Many, if not most, employees of covered employers are eligible for the FMLA's unpaid leave, benefit continuation, and job restoration entitlements.

A "covered employer" for purposes of the FMLA is one with 50 or more employees within 75 miles.

The employees of covered employers generally are eligible for unpaid leave under the FMLA if they have worked for the employer at least 12 months, at least 1,250 hours in the past 12 months, and at a location where the employer employs 50 or more employees within 75 miles.

When an employee takes FMLA leave, the employer is required to maintain the employee's health benefits.

And when the employee returns from FMLA leave, the employer generally is required to restore the employee to the same job that was held when the leave began, or to an "equivalent job" (i.e., a job that is virtually identical in terms of pay, benefits, and other terms and conditions).

On the other hand, the employee who takes FMLA leave has no greater right to reinstatement or to other benefits and conditions of employment than if no leave had been taken. Thus, the use of FMLA leave will not preclude the layoff of an employee who would have been laid off anyway.

Moreover, during an employee's FMLA leave, an employer may redistribute the employee's work, restructure positions, or take other actions required to operate the business during the absence. All of those actions are permissible provided that the employer restores the employee to the original job or an equivalent job following the leave.

2. The employee's FMLA benefits and entitlements can last up to 26 weeks.

The FMLA authorizes up to 12 weeks of unpaid leave in a 12-month period for any of the following reasons:

- The birth, adoption, or foster care placement of a child.
- To care for a spouse, son, daughter, or parent with a serious health condition (including incapacity due to pregnancy and for prenatal medical care).

- For a serious health condition that makes the employee unable to perform the essential functions of the job (including incapacity due to pregnancy and for prenatal medical care).
- For any qualifying exigency based on a spouse, son, daughter or parent being a military member on covered active duty or being called to covered active duty.

The FMLA also authorizes up to 26 workweeks of leave during a 12-month period when necessary to care for a covered service member with a serious injury or illness, if the employee is the spouse, son, daughter, parent or next of kin of the service member.

Employees are, however, limited to a combined total of 26 weeks of FMLA leave for qualifying reasons during a single 12-month period.

When an employee returns from FMLA leave, the employer must restore the employee to the same job that was held when the leave began or to an "equivalent job."

For employers, the most difficult part of managing FMLA leave may be this: The 12 or 26 weeks of FMLA leave may be taken in a lump sum or, in certain circumstances, on an intermittent or reduced schedule basis. And if the leave is taken on an intermittent or reduced schedule basis, it could be spread out over the course of an entire year.

3. Employers must provide four kinds of FMLA notice.

The FMLA's notice requirements are a major source of employer confusion, and they create risks for employers.

The FMLA regulations include the following warning:

> Failure to follow the notice requirements set forth in this section may constitute an interference with, restraint, or denial of the exercise of an employee's FMLA rights. An employer may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered (see Section 825.400(c)).[2]

Employers thus must be cognizant of their related duties. Their four notice obligations are as follows:

- The employer must post notice of FMLA rights. Covered employers are required to post conspicuously a general notice explaining the FMLA's provisions and providing information about procedures for filing complaints with the Department of Labor's wage and hour division.[3]
- The employer must provide general written notice of FMLA rights. Employers are required to provide their employees with general notice about the FMLA in employee handbooks or other written guidance to employees concerning employee benefits or leave rights, if such written guidance exists, or to distribute the general notice to each new employee upon hiring. This notice can be similar to the posted notice.[4]
- The employer must provide detailed notice to the employee upon learning of an FMLA request or FMLA-qualifying reason. Whenever an employee requests FMLA leave, or when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason, the employer must provide detailed notice to the particular employee of the employee's eligibility to take FMLA leave, the employee's rights and responsibilities under the FMLA, and the consequences of a failure to meet all obligations.[5]
- The employer must provide the employee notice of whether particular absences will be "designated" as FMLA leave. When the employer has enough information to determine whether a particular period of leave is being taken for an FMLA-qualifying reason, it must notify the employee whether the leave will be designated as FMLA leave (and thus counted against the

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employee's FMLA leave entitlement). This designation notice is due within five business days absent extenuating circumstances.[6]

Admittedly, that is a lot of required notice. But any covered employer who questions the need to provide all of that notice might want to consider the following nightmare scenario:

An FMLA-eligible employee begins a period of leave for an FMLA-qualifying reason. The employee remains absent for more than 12 weeks. The employee is discharged because the employer believes that the employee's 12 weeks of FMLA job protection have been exhausted and that the employer's obligation to provide that amount of job protection has been satisfied.

But, according to a demand letter thereafter received from the employee's lawyer, the employee's 12 weeks of job protection under the FMLA never even started to run because the employer failed to give the employee notice of FMLA rights and responsibilities when the absence began and failed to tell the employee that any portion of the absence had been designated FMLA leave.

In such circumstances, the aggrieved employee has a choice. The employee can file a complaint with the U.S. secretary of labor, or the employee can file a private lawsuit.

The employee's potential remedies are substantial. They include lost wages, lost employment benefits and other compensation denied; any actual monetary loss sustained as a result of the violation; interest; liquidated damages; appropriate equitable relief (such as employment, reinstatement, or promotion); and reasonable attorney fees, expert witness fees and other costs.[7]

FMLA records relating to certifications, recertifications or medical histories of employees or their family members must be maintained as confidential medical records.

4. The FMLA provides employers a check against employee fraud: The employer can require that the employee's purported need for FMLA leave be certified.

An employer can require the employee to provide certification from a health care provider that supports a need for leave to care for a covered family member with a serious health condition or supports a need for leave premised on the employee's own serious health condition that renders the worker unable to perform one or more essential job functions.

An employer also can require that an employee's leave because of a qualifying exigency or to care for a covered service member with a serious injury or illness be supported by a certification.

FMLA regulations provide that the employer should request certification when the employee gives notice of the need for leave or within five business days thereafter. In the case of unforeseen leave, the request should be made within five business days after the leave commences. The employer also can request certification at a later date if it later has reason to question the appropriateness of the leave or its duration.

The contents of the certification may vary. For example, when leave is taken because of the employee's own serious health condition, the employer can require that the employee obtain medical certification from a health care provider that provides the following information:

- Name, address, telephone number and fax number of the health care provider and type of medical practice/specialization.
- Approximate date on which the serious health condition commenced, and its probable duration.
- A statement or description of appropriate medical facts regarding the patient's health condition sufficient to support the need for leave. These medical facts may include information on symptoms, diagnosis, hospitalization, doctor visits, whether medication has been prescribed, any referrals for evaluation or treatment (physical therapy, for example), or any other regimen of continuing treatment.

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- Information sufficient to establish that the employee cannot perform the essential functions of the employee's job, as well as the nature of any other work restrictions and the likely duration of such inability.
- If the employee requests leave on an intermittent or reduced schedule basis for a serious health condition that may result in unforeseeable episodes of incapacity, information sufficient to establish the medical necessity for such intermittent or reduced schedule leave and an estimate of the frequency and duration of the episodes of incapacity.[8]

Employers can use the U.S. Labor Department's Optional Form WH-380E, if they so choose, when obtaining medical certifications, including second and third opinions, from health care providers when the need for leave is due to the employee's own serious health condition.[9]

Similarly, employers can use Optional Form WH-380F when obtaining medical certifications when the employee needs leave to care for a family member with a serious health condition.[10]

An employer can require the employee to provide certification from a health care provider that supports a need for leave.

5. The FMLA imposes stringent record-keeping obligations on employers.

FMLA regulations contain detailed instruction about the various types of FMLA-related documents and information that employers must maintain for at least three years.

These documents and items of information must be made available for inspection by the Labor Department upon request. The maintained records must disclose, among other things, dates of FMLA leave, whether the leave is taken in increments of less than a day, copies of all FMLA notices, any documents describing employee benefits or policies regarding the taking of paid and unpaid leave, premium payments of employee benefits, and records of any disputed FMLA leave.[11]

The record and document "segregation rules" also are important.[12] FMLA records and documents relating to certifications, recertifications, or medical histories of employees or employees' family members must be maintained as confidential medical records in separate files.

If the Genetic Information Nondiscrimination Act of 2008, 42 U.S.C.A. § 2000ff, is applicable, records and documents created for purposes of the FMLA that contain family medical history or genetic information as defined in GINA must be maintained in accordance with the confidentiality requirements of Title II of GINA (see 29 C.F.R. § 1635.9), which permit such information to be disclosed consistent with the requirements of the FMLA.

Further, if the Americans with Disabilities Act, 42 U.S.C.A. § 12101, is also applicable, such records must be maintained in conformance with the ADA's confidentiality requirements (see 29 C.F.R. § 1630.14(c)(1)), except that:

- Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations.
- First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment.
- Government officials investigating compliance with the FMLA (or other pertinent law) shall be provided relevant information upon request.

6. Employers must not neglect their FMLA obligations even though overlapping obligations also apply.

Rights and obligations relating to an employee's physical condition and the right to take job-protected leave are legion. They derive not merely from the FMLA and in the manner described above. Instead, they also arise in many other forms and come from many other sources. Many of those rights and obligations not only coexist but also overlap.

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There are, for example, state laws providing job-protected leave; federal and state laws providing reasonable accommodation rights, including rights to job-protected leave rights, to employees with disabilities; and short- and long-term disability policies providing leave and benefits in the particular manner that each individual policy specifies.

This broad array of laws, policies, rights and obligations hardly fits together into a consistent pattern, for either the employer or the employee.

Employers must understand, however, that they will not necessarily satisfy their FMLA obligations simply by meeting obligations created elsewhere.

For example, assisting an employee with a short-term disability benefits application does not excuse an employer's failure to follow the FMLA's notice and leave designation procedures.

"Disability" for purposes of a short-term disability policy is not necessarily the same as "serious health condition" within the meaning of the FMLA (or the same as "disability" within the meaning of state or federal disability discrimination laws).

Also, providing the full measure of job-protected leave under the FMLA will not necessarily satisfy the employer's reasonable accommodation obligations for an employee who is "disabled" within the meaning of state or federal disability nondiscrimination laws. The employer thus may have to consider allowing additional leave as a reasonable accommodation even after all FMLA leave has been exhausted.

Different types of employee benefits likewise can require different types of supporting medical information. Related rules can be complex. And on some of them, the regulations are specific.

For example, if an employee's FMLA leave runs concurrently with a workers' compensation absence, the FMLA does not prevent the employer from following workers' compensation provisions for obtaining supporting information — and any information received under those provisions may be considered in determining the employee's entitlement to FMLA-protected leave.[13]

Likewise, an employer can request additional information in accordance with a paid leave policy or disability plan that requires more information to qualify for payments or benefits, provided that the employer informs the employee that the additional information needs to be provided only in connection with the receipt of such payments or benefits. But any information received pursuant to such policy or plan can be considered in determining the employee's entitlement to FMLA-protected leave.[14]

If an employee's serious health condition may also be a disability within the meaning of the Americans with Disabilities Act, the FMLA does not prevent the employer from following ADA procedures for requesting medical information.

Further, any information received pursuant to ADA procedures may be considered in determining the employee's entitlement to FMLA-protected leave.[15]

NOTES

[1] The FMLA was enacted in 1993, is codified at 29 U.S.C.A. § 2601, and is explained in regulations at 29 C.F.R. Part 825. This article's statistic about its usage is reported by the National Partnership for Women & Families on its website, http://bit.ly/2pv5ojH.

[2] 29 C.F.R. § 825.300(e).

[3] 29 C.F.R. § 825.300(a)(1). The general notice recommended by the U.S. Labor Department can be found at http://bit.ly/1NW93Oo.

[4] 29 C.F.R. § 825.300(a)(1).

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[5] 29 C.F.R. § 825.300(b) & (c). A format for the notice recommended by the Labor Department (Form WH-381) can be found at http://bit.ly/2op5AvU.

[6] 29 C.F.R. § 825.300(d).

[7] 29 C.F.R. § 825.400.

[8] 29 C.F.R. § 825.306.

[9] The form can be found at http://bit.ly/2i5ILKQ.

[10] The form can be found at http://bit.ly/2pO6J1l.

[11] The complete set of record-keeping requirements is at 29 C.F.R. § 825.500.

[12] *See* 29 C.F.R. § 825.500(g).

[13] 29 C.F.R. § 825.306(c).

[14] *Id.*

[15] *Id.*

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