

## RECENT LITIGATION UNDER THE FAMILY AND MEDICAL LEAVE ACT (FMLA)

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### ABSTRACT

The Family and Medical Leave Act (FMLA) is the federal government's response to the growing tension between family and work. It establishes a right to unpaid family and medical leave for employees. This article reviews the more important recent court decisions interpreting the FMLA and its regulations.

Increasingly, children and the elderly are dependent for care upon family members who must spend long hours at work. When a family emergency arises, employees need reassurance that they must not choose between 1) continuing their employment; 2) meeting their personal and family obligations; or 3) tending to vital needs at home.

The Family and Medical Leave Act (FMLA) of 1993 is the federal government's response to the growing tension between family and work [1]. It establishes a right to unpaid family and medical leave for employees.

The FMLA entitles an "eligible employee" to take up to twelve work weeks of unpaid leave during any twelve-month period for:

1. The birth of a child and to care for this child;
2. For the placement of a child for adoption or foster care;
3. To care for a spouse or an immediate family member with a serious health condition; or
4. A serious health condition that makes the employee unable to perform the functions of his or her position [1 at 29 U.S.C. § 2612 (a) (1)].

Because of its complexities, the FMLA and the U.S. Department of Labor's (DOL's) implementing regulations have generated considerable litigation over eligibility, notice, reinstatement, retaliation, and serious health condition [1]. In 1997, the DOL released a report discussing the FMLA's enforcement since 1993 [2]. A follow-up report was released by the DOL in August 1998 providing additional statistics and conclusions [3].

According to the DOL's 1998 report, 12,633 complaints were received and 90 percent were successfully resolved [3]. The 1997 DOL report indicated 8,358 complaints were received and compliance actions were completed on 7,433 complaints [2]. In one year, the complaint number had increased by 33 percent, illustrating the FMLA's litigation potential.

The 1997 DOL report indicated the valid complaints involved:

1. *Employee Reinstatement*. Forty percent concerned an employer's refusal to reinstate an employee to the same or equivalent position;
2. *Leave Granting*. Twenty-three percent dealt with an employer's refusal to grant an FMLA leave;
3. *Interference with Employee Rights*. Ten percent were related to an employer's interference with or discrimination against an employee using an FMLA leave;
4. *Benefit Continuation*. Four percent alleged that an employer refused to maintain an employee's group health plan benefits;
5. *Multiple Reasons*. Fourteen percent; and
6. *Other Reasons*. Nine percent [2].

With the DOL's 1997 and 1998 reports in mind, this article reviews the more important court decisions interpreting the FMLA and its regulations. These court decisions are important to gain a better understanding of the FMLA and its litigation trends for implementation and administration by human resource managers and attorneys advising these managers and for employees requesting FMLA leaves. Areas examined include: care for a relative, child leave (birth/placement), continuing treatment, employee eligibility, employee notice, employer coverage, employer notice, FMLA regulations; validity, medical certifications, no fault attendance policies, paid-leave substitution, pregnancy, reinstatement, requiring FMLA leave, retaliatory actions, serious health condition, sick leave, unemployment compensation, and waiver of FMLA rights.

### **CARE FOR A RELATIVE**

The FMLA permits an employee to take FMLA leave for the care of his/her daughter, son, spouse, or parent with a serious health condition [1 at 29 U.S.C. § 2612 (a) (1) (C); 29 C.F.R. § 825.112 (a) (3)]. For example an employee's daughter's upper respiratory infection was a "serious health condition" that satisfied the FMLA's requirements [4, 5].

The fact that an employee's child, however, was suspected of being sexually molested did not constitute a serious health condition for the employee [6]. Likewise, FMLA leave to take care of a deceased relative was denied [7, 8].

An employer was not required to give an employee FMLA leave after her son's death [9]. FMLA was not meant for bereavement.

### **CHILD LEAVE (BIRTH/PLACEMENT)**

The FMLA permits an employee to take FMLA leave for the birth of an employee's child and for the placement of a child with the employee for adoption or foster care [1 at 29 U.S.C. §§ 2612 (a) (1); 2612 (a) (1) (B); 29 C.F.R. §§ 825.112 (a) - 825.112 (c)]. Summary judgment was inappropriate on an employee's claim that an employer discriminated against her for attempting to exercise her right to pregnancy leave benefits under the FMLA when the employer terminated her one day before she was to begin leave [10]. Likewise, an FMLA claim was stated for denying an employee leave following a daughter's birth [11].

An employee who alleged he took leave to travel to New York to place a young girl in his custody for adoption or foster care stated an FMLA claim, even if he was the young girl's biological father [12]. FMLA leave for adoption or foster care expires twelve months from the placement date [13].

### **CONTINUING TREATMENT**

"Continuing treatment" requires that the employee be incapacitated to qualify for an FMLA leave [1 at 29 C.F.R. § 825.800]. Under the FMLA's regulations, it also includes examinations to determine whether a serious health condition exists and evaluations of a condition as treatment [14].

Migraine headaches have qualified as continuing treatment [15, 16]. A peptic ulcer's flare-up [17] and treatment of keloids may also qualify [18].

Continuing treatment, however, was not found where an employer terminated an employee who suffered from hypertension and atrial fibrillation [19]. The employee's condition did not prevent him from performing his job. His doctor did not recommend that he stay out of work. He saw the doctor for periodic checkups without missing work time.

### **EMPLOYEE ELIGIBILITY**

To qualify for an FMLA leave, the employee must have been employed for at least twelve months by his/her employer and for at least 1,250 hours with his/her employer during the previous twelve months [1 at 29 U.S.C. § 2611 (2) (A); 29 C.F.R. §§ 825.110, 825.111]. Employee eligibility may arise from a number of factors, discussed below.

## **Hours/Months Worked**

The FMLA requires that the employee must have been employed for at least 1,250 hours with his/her employer during the previous twelve months [1 at 29 U.S.C. § 2611 (2) (A); 29 C.F.R. §§ 825.110, 825.111]. An employee is not eligible for an FMLA leave who works fewer than the required 1,250 hours [20, 21].

Hours worked with distinct and separate employers cannot be combined to establish FMLA leave eligibility [22]. An employee's work with a predecessor company, however, may be used to establish hours worked for FMLA eligibility. For example, an employee who was employed by the employer's predecessor was permitted to show that the hours worked with the former employer should be credited for FMLA leave eligibility [23].

Vacation days, personal holidays, days of suspension, holidays, and sick days are not counted as "hours of service" in determining employee eligibility. The FMLA requires that hours of service must be determined by applying the Fair Labor Standards Act's (FLSA) principles [1 at 29 C.F.R. Part 785]. Neither paid leave nor unpaid leave is considered hours worked under the FLSA [24].

To deny an FMLA leave, the employer must maintain adequate records to verify that the required hours were not worked by the employee [1 at C.F.R. § 825.500]. An airline employer, however, that failed to keep records of time a flight attendant spent working after the flight "blocked in" was still able to establish that the attendant was not an FMLA eligible employee [25]. It determined how much time the attendant spent working after the flight "blocked in" by multiplying the time she remained on board after the "block in" by the number of duty periods. This formula established that the attendant did not work the required 1,250 hours [26].

## **Intermittent Leave**

An employee eligible for intermittent FMLA leave need only establish eligibility for the first absence and not for each subsequent absence [5].

## **Temporary Employees**

A temporary employee may also qualify for FMLA leave. An employee assigned by a temporary employment agency to a company's facility in December 1994 became a permanent employee of the company in July 1995 [27]. The employee worked at the company's facility for the twelve-month period. Her reclassification from temporary employee to permanent employee did not alter the time period for calculating FMLA eligibility [27].

## **Laid-Off Employees**

The term “employee” for FMLA purposes includes laid-off employees [1 at 29 C.F.R. § 825.216 (A) (1); 28]. An employee who is laid off, however, cannot take an FMLA leave that is not eligible for the leave [29].

## **Employee Resignations**

Resigning from employment prior to requesting an FMLA leave does not entitle an employee to an FMLA leave [30]. A resignation does not entitle an employee to be restored to the same or equivalent position upon completing the FMLA leave [31].

## **EMPLOYEE NOTICE**

Generally, an employee must provide the employer with thirty days’ advance notice for a foreseeable FMLA leave. Where this notice is not possible, notice must be given as soon as practicable [1 at 29 U.S.C. § 2612 (e); 29 C.F.R. §§ 825.302, 825.303].

## **Adequate Notice**

Employees who take time off do not have to expressly mention the FMLA when they notify their employers of their need for leave [32]. The FMLA’s notice provision, which requires employees to notify their employers of their need to take FMLA leave, does not require employees to mention the FMLA by name. Congress, in enacting the FMLA, did not intend to impose this onerous requirement on employees. Employees simply need to state that a leave is needed. It then becomes the employer’s obligation to inquire whether or not the employee is requesting FMLA leave.

Verbal notice may be sufficient. An employee’s verbal notice that he would be absent because of a headache may be adequate FMLA notice [33]. The employee informed his employer when he began employment that he took prescription medication for migraine headaches. His supervisors were aware that he took a number of days off because of migraine attacks. The employee had also submitted doctor’s notes that the absence was due to migraine headaches [33].

An employee provided sufficient verbal notice that she was requesting FMLA leave at the time of her last absence. The migraines were a serious health condition [16].

An employee’s failure to inform her employer that she was taking FMLA leave did not affect her being protected by the FMLA so long as she gave some form of notice of her daughter’s serious health condition [34]. Likewise, an employee’s verbal notice for personal time off due to his son’s death put the employer on notice that it was an FMLA leave [14].

Written notification is sufficient to put the employer on notice. Summary judgment was inappropriate where the employee testified that she completed a written notification and specifically stated that her absences were due to headaches [15]. An employee's conduct in filling out a city-provided leave request form, indicating that the cause was medical need, and attaching a doctor's note requiring her to take time off was sufficient to put the city on notice that this was a possible FMLA leave [35; see also 4].

### **Inadequate Notice**

An employee must give an employer reasonable notice to determine that an FMLA leave situation exists. Inadequate notice existed where an employee's wife/coworker called the employer on the first day of the employee's absence and said that she and her husband would be out for a while [36]. The employee also informed the labor relations officer five days later that he would be out and did not know when he would return. No further information was provided [36].

Employees cannot withhold information regarding an absence [37]. The employer can require an employee on FMLA leave to report periodically regarding his/her status [38].

Employees cannot claim ignorance of the FMLA's requirements where the employer has complied with the FMLA's posting requirements. An employee could not justify his failure to follow the FMLA's procedure for giving notice by claiming he never knew of the FMLA [39]. The employer had satisfied the FMLA's notice requirements by posting an FMLA notice in employee break rooms and discussing the FMLA in the employee handbook and in employee risk-management sessions. The employee had also received FMLA information during a previous FMLA leave [39].

## **EMPLOYER COVERAGE**

An employer must have a sufficient number of employees to fall within the FMLA's coverage [1 at 29 U.S.C. § 2611 (4) (A); 29 C.F.R. § 825.104, 825.105]. A corporation was not considered an FMLA employer because it did not employ fifty or more employees for each working day during each of twenty or more calendar workweeks in the current or preceding calendar year [40]. These statutory requirements are applicable even though an employer formally adopts the FMLA's provisions by adding a policy to its employee handbook [41, 42].

Employment by distinctly different employers cannot be combined to create FMLA employer coverage [1 at 29 C.F.R. § 825.106, 22; 43].

## **EMPLOYER NOTICE**

The FMLA and its regulations require an employer to notify employees of their FMLA leave rights through postings, written policies, etc. [1 at 29 U.S.C. § 2619; 29 C.F.R. §§ 825.300, 825.301].

### **Adequate Employer Notice**

The FMLA's employer-notice requirements can be satisfied where the employer posts the FMLA notice in employee break rooms, sets forth an FMLA policy in the employment handbook, and discusses it in employee risk-management sessions [39]. However, an employer's failure to present evidence that it had posted the required FMLA notice did not prohibit the employer from terminating an employee [44]. The employee had failed to give notice of her need for leave under the FMLA [44]. The FMLA's regulations do not place the burden of proving compliance with the posting requirements on the employer. The regulations prohibiting an employer that has failed to post the required notice from taking an adverse action against an employee applies only when the employee is required to provide advance notice of the need for FMLA leave. It does not apply to situations where the employee's need for leave is unforeseeable, as in this case.

### **Inadequate Employer Notice**

The FMLA notice must be posted conspicuously by the employer in a place where employees can reasonably expect the notice to be placed [45]. Failure to make the required FMLA postings can affect an employer's ability to take adverse actions against an employee [45].

The FMLA's regulations provide that an employer who fails to provide written notice concerning employee rights and obligations cannot take an adverse action against an employee for failing to comply with any provision required to be set forth in the notice. An employer's admitted failure to post the required FMLA notice precluded it from claiming that the employee should have known of his FMLA rights [11]. Likewise, an employer that never informed an employee of his FMLA rights and obligations could not claim that an employee had forfeited his FMLA rights when he failed to report for work the day after his daughter's death [46]. In the absence of proper FMLA notice, an employee was entitled to twelve weeks of FMLA leave plus five days of paid vacation leave [47].

Failure to give adequate FMLA notice can affect the employer's right to request medical certifications. An employer was not entitled to a summary judgment where the employee failed to provide a medical certification that he was needed to care for his wife [48]. There was no evidence that the employee had been notified to provide a medical certification [49].

## FMLA REGULATIONS' VALIDITY

The FMLA required the Department of Labor to promulgate regulations [1 at 29 U.S.C. § 2654]. These final FMLA regulations were issued on January 6, 1995 [1 at 29 C.F.R. §§ 825.100-825.800]. Since their adoption, these regulations have generated litigation over their validity.

The FMLA's regulation prohibiting an employee's waiver of FMLA rights was found valid [50]. A release where an employee agreed to dismiss her Civil Rights Act of 1964 (Title VII) claims and all other causes of action was not enforceable [50].

Other FMLA regulations, however, have been found invalid. For example, the FMLA's regulations stating that an employer that confirms FMLA eligibility when the leave's notice is received may not subsequently challenge the employee's eligibility were found invalid [51]. These regulations contradict Congress' intent regarding employee eligibility. If the employee is in fact ineligible for FMLA leave, the employer cannot on its own action confer statutory FMLA status on the employee.

The FMLA's regulations under which an employer's failure to give prospective notice that an absence from work is being designated as FMLA leave precludes the leave from being counted against the employee's twelve-week leave entitlement have also been found invalid [52]. The regulations add requirements that go beyond the FMLA. They are inconsistent with the FMLA's purpose of protecting employees who take twelve or fewer weeks of leave by granting entitlements that were not given by Congress. The regulations convert an employer's right to require an employee to substitute employer-provided paid leave for unpaid FMLA leave into an employee entitlement to more than twelve weeks of leave.

The Department of Labor usurped the legislature's and judiciary's constitutional authority by making an employee eligible for FMLA leave unless the employee is given notice of ineligibility from the employer within two days after it receives the employee's leave request [53].

## MEDICAL CERTIFICATIONS

The FMLA and its regulations permit an employer to require medical certifications under certain circumstances [1 at 29 U.S.C. § 2613; 29 C.F.R. §§ 825.305-825.311]. To request a medical examination, the employer must formally notify the employee.

An employee's medical examination, however, that occurred after he commenced leave was sufficient to bring him within the FMLA's protection even though the employer's internal procedures indicated that medical evidence must be submitted to the employer before a medical leave would be

granted [14]. The employer did not comply with the FMLA's regulations. It failed to provide notice for this certification and to post the FMLA notice [see also 49].

The initial certification must be performed by the employee's own physician. The United States Postal Service (USPS) could not require a district manager who had taken a leave of absence to submit to a fitness-for-duty examination, including a psychiatric evaluation, with a doctor it designated. The FMLA requires the employer to rely on an evaluation done by the employee's clinician. The letter from the manager's doctor certifying her fit to return to work as long as the USPS made necessary changes to assure her of freedom from harassment and discrimination satisfied the FMLA's fitness-for-duty standard [54]. If the USPS believed the doctor's proviso against alleged harassment indicated limitations on the manager's ability to work, it should have sought a clarification from the doctor [54].

If the employer is not satisfied with the medical certification, it can request a second opinion. An employer properly sent a notice requiring an employee on FMLA leave to obtain a second-opinion medical examination to the employee's last address of record [55].

The employer cannot use an employer-associated doctor for the examination. The FMLA expressly prohibits the use of an employer-associated doctor for a second opinion. A city could not use the city doctor's opinion in determining whether an employee who requested leave was fit to work [35]. However, a hospital did not violate the FMLA when it requested that a technician obtain a second opinion from a psychiatrist who rented office space in the hospital but was never employed by the hospital [56].

If an employee fails to return to work with a properly requested FMLA medical certification, the employee can be terminated. An employer did not violate the FMLA when it terminated an employee who failed to return to work at the end of a twelve-week leave period ready to work and within the requisite certification of fitness for duty [57].

The FMLA was not violated when an employer terminated an employee for excessive absences after the employee's doctor certified that the employee, who suffered from chronic fatigue syndrome, was not presently incapacitated and could return to work [58]. No merit was found in the employee's contention that once he called in sick that the employer was required to investigate further and require a doctor's certification if it wanted verification of his condition. Once the employee said that he was missing work because of chronic fatigue syndrome, he was providing a reason that the employer knew that the doctor had concluded was not a qualifying FMLA leave reason. If the employee knew the doctor's initial certification was wrong, it was the employee's burden to have it corrected. The employee did nothing to obtain a contrary opinion from that doctor or another one [58].

## **NO-FAULT ATTENDANCE POLICIES**

An employer cannot count FMLA absences under a no-fault attendance policy [1 at 29 C.F.R. § 825.220 (c)]. An employer's no-fault attendance policy violated the FMLA [59]. Any absence other than that taken within vacation time was characterized as an occurrence and counted in the point system for taking disciplinary action. The attendance policy did not except an absence caused by a serious health condition [59].

An employee's daughter who had a "serious health condition" could not be terminated [60]. The employee should not have been assessed absence points for her absence [60].

## **PAID-LEAVE SUBSTITUTION**

Prior to taking an FMLA leave, an employer must give the employee notice that paid leave will be designated as part of the FMLA leave [1 at 29 U.S.C. § 2612 (d) (2); 29 C.F.R. §§ 825.207 (b), 825.207 (c), 825.207 (e), 825.207 (f), 825.208 (c)]. A store manager who received employer-provided disability pay for thirteen of fifteen weeks of leave stated no FMLA claim [47]. The FMLA provides protection only when the employee takes twelve or fewer weeks of leave. The manager took more than twelve weeks of leave. She collected disability pay while on leave and the employer properly counted that paid leave against her FMLA entitlement. The FMLA allows an employee to elect or the employer to substitute accrued paid leave for unpaid FMLA leave. This provision exists so that employees may not be told that leave must be taken as unpaid when an alternative employer-provided paid leave may be taken. The FMLA does not require that the employee be given twelve unpaid weeks of leave in addition to the paid weeks provided by the employer [see also 52].

The employer cannot retroactively designate vacation and sick days taken by an employee as FMLA leave [1 at 29 C.F.R. § 825.208 (c)]. An employer that has the requisite knowledge to determine that a leave is FMLA but fails to designate it as FMLA leave when the leave commences must wait until the employee is notified of this designation for the time period to begin on the FMLA's twelve-week limit for unpaid leaves [61].

## **PREGNANCY**

The FMLA and its regulations permit an employee to take leave for the birth of a child [1 at 29 U.S.C. § 2612 (a) (1) (A); 29 C.F.R. § 825.112 (a) (1)]. An employee's failure to provide evidence from a health care provider that her morning sickness rendered her unable to perform her job functions was not fatal to her FMLA claim [62]. Neither the FMLA nor its regulations require this evidence in cases of pregnancy-related morning sickness. Pregnancy is treated in

the regulations differently from other serious health conditions [1 at 29 C.F.R. § 825.114 (e)]. In the absence of the employer's request for medical certification, the regulations that specifically address pregnancy and related conditions cannot be reconciled with the requirement that pregnant employees must always provide medical evidence that they are unable to work due to morning sickness.

## **REINSTATEMENT**

### **Equivalent Position**

Upon return from an FMLA leave, the FMLA and its regulations require that the employer reinstate the employee to the "same" or "equivalent" position [1 at 29 U.S.C. § 2614 (a) (1); 29 C.F.R. §§ 825.214-825.216]. For example, an employee was restored to her former position as house producer for the employer's news show [60].

Where the same position is not available, the FMLA entitles employers to return employees not to the position they left before taking the leave, but to an equivalent position [7]. A headquarters secretary's position was equivalent to a field secretary [63].

Employers have violated the FMLA where employees were not reinstated to equivalent positions. An employee was not reinstated to the same or equivalent position, but was placed on probation, discriminated against, and terminated for exercising FMLA rights [64].

Genuine issues of material fact existed whether the third-shift attendant position and an office job were equivalent [65]. The employee had held a managerial position before the leave.

A former warehouse manager was returned to a position as a salaried warehouse coordinator [66]. The employee eventually became a corporate sales representative who received salary plus commission. This change in compensation raised genuine issues concerning the employee's future tangible economic loss. The manager provided evidence that his vacation and sick pay were devalued by at least 10 percent due to the change [66].

### **Failure to Reinstate**

An employer is required to reinstate the employee upon the FMLA leave's completion [1 at 29 U.S.C. § 2614 (a) (1); 29 C.F.R. §§ 825.214-825.216]. The FMLA was violated when an employer failed to restore an employee to his prior position upon return to work prior to the FMLA leave's expiration [47].

However, an employer was not required to reinstate an employee to her billing manager position when she returned from an FMLA leave [67]. The employee would have been terminated for poor work performance even if she had not taken leave. Prior to taking leave, the employee had been placed on a corrective action program. The employer presented evidence that the employee had failed to meet

the program's goals. The employee did not offer any evidence that she was performing well in the areas that prompted her termination [67].

No FMLA claim existed in an employee's restoration to her position of a hospital's director of human resources [68]. Her ability to work extended hours was an essential function of the position. The employee, who was unable to work more than forty hours per week, could not effectively perform her job's functions [68].

### **Layoff**

Employees laid off during an FMLA leave are not entitled to be reinstated upon the leave's completion [1 at 29 C.F.R. § 825.216 (a) (1)]. An employer articulated a legitimate nondiscriminatory reason for laying off an employee [19]. The reduction in force was legitimate and economically necessary. The employee's performance was below par and significantly lower than the performance of all similarly situated employees [19].

A laid-off employee, however, was permitted to claim reinstatement [28]. The employer had refused to rehire the laid-off employee because he had a poor attendance rating resulting from an FMLA-protected absence [28].

## **REQUIRING FMLA LEAVE**

Nothing under the FMLA prevents an employer from requiring an employee to take FMLA leave where it is available. The FMLA was not violated when an employer placed a pregnant lab technician on FMLA leave, even though the technician did not request the leave [69]. The employer had been presented with a medical opinion that the technician could not be exposed to chemicals, which was an essential job element. The employer was permitted to characterize the employee's absence as FMLA leave [69].

## **RETALIATORY ACTIONS**

Employers cannot retaliate against an employee for exercising or failing to exercise any FMLA rights [1 at 29 U.S.C. § 2615; 29 C.F.R. § 825.220].

### **Burden of Proof**

The shifting burden of proof analysis of *McDonnell Douglas Corp. v. Green* [70] applies to FMLA claims, making it unlawful for an employer to terminate or discriminate against any individual for opposing any FMLA practice [48]. To establish a prima facie FMLA retaliation case, the plaintiff must show that s/he availed himself/herself of a protected FMLA right, was adversely affected by an employment decision, and a causal connection existed between the protected activity and the adverse employment action [19, 71].

A city housing authority's former police supervisor who claimed the authority's chief of police and director of human resources retaliated against him for complaining to the Department of Labor stated a claim [72]. He alleged he was terminated, his benefits were discontinued or modified without notice or justification, information concerning his rights under COBRA was intentionally withheld, and his medical expenses were not paid [72].

An employee sufficiently pleaded FMLA violations [64]. She alleged when she returned from FMLA leave she was not reinstated to the same or equivalent position, was placed on probation, discriminated against, and was terminated for exercising FMLA rights [64].

An employee attempting to establish an FMLA claim through circumstantial evidence may establish a prima facie case by using 1) a discriminatory framework analysis under which the employee must prove s/he was a member of a protected class, suffered an adverse job action, was qualified for the position s/he was holding, and another employee who did not exercise rights under the FMLA was treated more favorably, or 2) a retaliatory framework analysis under which the employee must prove s/he availed himself or herself of the protected FMLA rights, suffered an adverse job action, and a causal connection existed between the assertion of the FMLA right and the adverse employment action [34].

### **Types of Retaliation**

An employee was permitted to maintain an action against an employer for retaliation where the employer terminated the employee for asserting FMLA rights [47]. Terminating an employee prior to beginning an FMLA may be retaliation [10]. Reassignment to a new position with a pay reduction may constitute retaliation [34]. Demoting an employee upon return to work may raise retaliation issues [46]. Taking an adverse action against an employee through a disciplinary suspension raises retaliation concerns [48]. Laying off an employee upon return from an FMLA leave may be considered retaliation [73].

Retaliation for exercising FMLA rights was not found where an employer had terminated an employee who suffered from hypertension and atrial fibrillation and who chose to remain out of work for a six-week period [74]. Even if the employee's condition qualified as a serious health condition, there was no evidence his condition rendered him unable to perform his position's function. The employee's doctor found the employee was able to continue working. Retaliation was not found where an employee failed to give notice of the need for FMLA leave [44].

### **SERIOUS HEALTH CONDITION**

The FMLA and its regulations define a "serious health condition" in considerable detail [1 at 29 U.S.C. § 2611 (11); 29 C.F.R. § 825.114]. The following claims have been stated to determine whether a serious health condition existed.

### **Asthma**

Asthma can be a serious health condition [9]. Depending on the circumstances, however, asthma may not be a serious health condition [75].

### **Back Injuries**

A general back injury is not a serious health condition [9, 76]. An employee's degenerative back condition, however, qualified as a serious health condition [41].

### **Bronchitis**

Bronchitis is not a serious health condition where the employee is not incapacitated and receives no continuing treatment by a health care provider [9].

### **Carpal Tunnel Syndrome**

Employee's manifestation of carpal tunnel syndrome was not a serious health condition, even though carpal tunnel syndrome if sufficiently severe could be a serious health condition [77].

### **Chicken Pox**

Chicken pox is a serious health condition [59].

### **Chronic Fatigue Syndrome**

Chronic fatigue syndrome is not a serious health condition [58].

### **Diabetes**

Diabetes is a serious health condition [9].

### **Ear Infection (Otitis Media)**

An ear infection is not a serious health condition [78].

### **Eczema (Skin Condition)**

Eczema is not a serious health condition [9].

### **Food Poisoning**

Food poisoning is not a serious health condition [79].

**General Illness**

A general illness that incapacitates an individual is not covered by the FMLA [4, 44].

**Grief and Despair**

A serious health condition contemplates only a medical condition affecting the living. An employee, however, who claimed he was entitled to an FMLA leave due to the “grief and despair” suffered following his mother’s death was permitted to amend his complaint if he could support a claim that he suffered from a serious health condition [23]. An employer, however, properly terminated an employee for failing to return from leave following his father’s death [80]. The doctor stated the employee could perform activities of daily living during the leave period.

**Headaches**

Migraine headaches may be a serious health condition [15].

**High Blood Pressure (Hypertension)**

Hypertension absent incapacitation that prevents an employee from performing his/her duties is insufficient to establish a serious health condition [75].

**Menstrual Bleeding**

Menstrual bleeding may not qualify as a serious health condition [81].

**Morning Sickness**

Morning sickness may qualify as a serious health condition [62].

**Motor Vehicle Accident**

Injuries resulting from a motor vehicle accident may be sufficient in scope to constitute a serious health condition [61].

**Multiple Diagnoses**

If temporarily linked, several diagnoses, no one of which alone arises to the level of a serious health condition can, if taken together, constitute a serious health condition. An employee with multiple diagnoses, including elevated blood pressure, hyperthyroidism, back pain, severe headaches, sinusitis, infected cyst, sore and swelling throat, coughing, and stress and depression, submitted enough evidence to withstand a summary judgment on a claim that she did not suffer from a serious health condition under the FMLA [35]. The employee’s doctor

swore in an affidavit that she was on the edge of a physical and mental breakdown and there was no way she could perform her job due to her physical and mental state.

### **Poison Ivy**

Poison ivy is not a serious health condition where an employee had received treatment for it only on one occasion, no medication was prescribed, and nothing indicated the employee was incapacitated due to it [82].

### **Rectal Bleeding**

Rectal bleeding, possibly caused by hemorrhoids, was not a serious health condition [83].

### **Respiratory Infections**

Respiratory infections are not serious health conditions [84].

### **Sexual Harassment**

Sexual harassment may rise to the level of a serious health condition. An employee who alleged that as a result of assault and other episodes of sexual harassment by her supervisors she required medical attention gave the employer sufficient notice of claims for a serious health condition [85]. The serious health condition included shock, tremors, panic attacks, severe chest pains, and an inability to breathe. These affected her mental and physical health and rendered her unable to perform her job functions for more than three days [86].

### **Sexual Molestation**

The fact that an employee's child was suspected of being sexually molested did not constitute a serious health condition for the employee [6].

### **Shoulder Injury**

A shoulder injury may constitute a serious health condition [86].

### **Sinobronchitis**

Sinobronchitis is not a serious health condition [87].

### **Tendinitis**

Tendinitis is not a serious health condition [88].

**Toothache**

Routine tooth extractions are not serious health conditions [89].

**Ulcers**

Ulcers may be a serious health condition [17]. A mild ulcer, however, is not a serious health condition [89].

**Upset Stomach (Gastroenteritis)**

Even though the FMLA's regulations list upset stomach and minor ulcers as example of conditions that do not meet a serious health condition's definition, the Department of Labor issued an opinion letter stating that if the conditions listed in the regulations met the regulatory criteria for a serious health condition the absence could be FMLA-protected [90]. An employee's upset stomach, however, was not a serious health condition [4]. Likewise, a stomach virus was not a serious health condition [39].

**SICK LEAVE**

Under the FMLA, an employee may elect or an employer may require that paid sick leave be substituted for unpaid FMLA leave where the leave is for the employee's serious health condition or to care for a family member's serious health condition [1 at 29 U.S.C. § 2612 (d) (2) (B); 29 C.F.R. §§ 825.207 (c); 825.208 (c)]. An employer's sick leave policy and its use cannot conflict with the FMLA. However, nothing in the FMLA prohibits an employer from making a sick family member's residency in the employee's household a condition for receiving paid sick leave [90].

**UNEMPLOYMENT COMPENSATION**

Unemployment compensation claims may arise out of an FMLA leave. These may be based on an employee's termination for exercising FMLA rights, not returning from leave, failing to follow employer reporting procedures, refusing to obtain a medical certification, etc. An employee was ineligible for unemployment compensation where the employee voluntarily resigned [91]. She ignored repeated requests following expiration of her FMLA leave that she complete the employer's form for a medical/personal leave of absence.

**WAIVER OF FMLA RIGHTS**

The FMLA's regulations prohibit an employee from waiving or an employer from inducing an employee to waive FMLA rights [1 at 29 C.F.R. § 825.220 (d)].

This regulation has been found to be valid [50]. A release was not enforced where an employee agreed to dismiss claims under the Civil Rights Act of 1967 (Title VII) and to release the employer from all causes of action.

## CONCLUSIONS

From the recent litigation interpreting the FMLA and its regulations, it has become clear that employees, employers, human resource managers, and attorneys need to understand the emerging trends. Failure to have a working knowledge of these court decisions may lead to unwanted results in determining an employee's eligibility for FMLA leave, denying an FMLA leave, reinstating an employee after an FMLA leave and the like.

\* \* \*

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## ENDNOTES

1. Pub. L. No. 103-3, 107 Stat. 6 (1993); codified at 2 U.S.C. §§ 1301, 1302, 1312, 1381-1385, 1401-1416; 5 U.S.C. §§ 6381-6387; 29 U.S.C. §§ 2601, 2611-2619, 2631-2636, 2651-2654 (Supp. VI 1994, 1995); 29 C.F.R. §§ 825.100-825.800 (1999).
2. U.S. Department of Labor *41 Months of Enforcement and Outreach Activity (August 5, 1993-December 31, 1996)* (1997).
3. Department of Labor, *Five Years of Success (August 5, 1993-August 5, 1998)* (1998).
4. *Brannon v. Oshkosh B'Gosh, Inc.*, 897 F. Supp. 1028 (M.D. Tenn. 1995).
5. *Barron v. Runyon*, 11 F. Supp. 2d 676 (E.D. Va. 1998) (care of wife).
6. *Martyszenko v. Safeway*, 120 F.3d 120 (8th Cir. 1997).
7. *Brown v. J. C. Penney Corp.*, 924 F. Supp. 1158 (S. D. Fla. 1996).
8. See also *Sakellarion v. Judge & Dolph, Ltd.*, 893 F. Supp. 800 (N.D. Ill. 1995) (daughter's asthma attack over the weekend not considered a serious health condition); *Seidle v. Provident Mutual Life Ins. Co.*, 871 F. Supp. 238 (E. D. Pa. 1994) (child's ear infection (otitis media) was not a serious health condition within the meaning of the FMLA).
9. *Beal v. Rubbermaid Commercial Products*, 972 F. Supp. 1216 (S. D. Iowa 1997).
10. *Dumoulin v. Formica*, 968 F. Supp. 68 (N.D.N.Y. 1997).
11. *Knussman v. State of Maryland*, 935 F. Supp. 659 (D. Md. 1996).
12. *Kelley v. Crosfield Catalysts*, 135 F.3d 1202 (7th Cir. 1998).

13. *Bocalbos v. National Western Life Insurance*, 5 Wage & Hour Cas.2d (BNA) 75 (5th Cir. 1998).
14. *Stubl v. T. A. Systems, Inc.*, 984 F. Supp. 1075 (E.D. Mich. 1977).
15. *Vargo-Adams v. United States Postal Service*, 992 F. Supp. 939 (N.D. Ohio 1998).
16. *Hendry v. GTE North, Inc.*, 896 F. Supp. 816 (N.D. Ind. 1995).
17. *Victorelli v. Shadyside Hospital*, 128 F.3d 184 (3rd Cir. 1997).
18. *Sheppard v. Diversified Foods and Seasonings, Inc.*, 1996 W. L. 54440, 5 A.D. Cas. (BNA) 479 (E.D. La. 1996).
19. *Hodgens v. General Dynamics*, 963 F. Supp. 102 (D.R.I.), *aff'd*, 144 F.3d 151 (1st Cir. 1998).
20. *Rockwell v. Mack Trucks*, 8 F. Supp. 2d 499 (D. Md. 1998).
21. See also *Caruhers v. Proctor & Gamble*, 961 F. Supp. 1484 (D. Kan. 1997); *Seaman v. Downtown Partnership*, 991 F. Supp. 751 (D. Md. 1997); *Mion v. Aftermarket Tool & Equipment*, 990 F. Supp. 535 (W.D. Mich. 1997).
22. *Rollins v. Wilson County Government*, 967 F. Supp. 990 (M.D. Tenn. 1997).
23. *Lange v. Showbiz Pizza Time*, 12 F. Supp.2d 1150 (D. Kan. 1998).
24. *Clark v. Allegheny University Hospital*, 4 Wage & Hour Cas.2d (BNA) 744 (E.D. Pa. 1998).
25. *Robinson-Scott v. Delta Airlines*, 4 F. Supp.2d 1183 (N.D. Ga. 1998).
26. See also *Cantrell v. Delta Airlines*, 2 F. Supp.2d 1460 (N.D. Ga. 1998); *Rich v. Delta Airlines, Inc.*, 921 F. Supp. 767 (N.D. Ga. 1996).
27. *Miller v. Defiance Metal Product*, 989 F. Supp. 945 (N.D. Ohio 1997).
28. See *Duckworth v. Pratt & Whitney, Inc.*, 152 F.3d 1 (1st Cir. 1998).
29. *Brohm v. JH Properties*, 149 F.3d 517 (6th Cir. 1998).
30. *Hammon v. DHL Airways*, 165 F.3d 441 (5th Cir. 1999).
31. *Walshall v. Fulton County School District*, 18 F. Supp.2d 1378 (N.D. Ga. 1998).
32. *Manuel v. Westlake Polymers Corp.*, 66 F.3d 758 (5th Cir. 1995).
33. *Ware v. Stahl Specialty Company*, 4 Wage & Hour Cas.2d (BNA) 974 (W.D. Mo. 1998).
34. *Peters v. Community Action Committee*, 977 F. Supp. 1428 (M.D. Ala. 1997).
35. *Price v. Fort Wayne*, 117 F.3d 1022 (7th Cir. 1997).
36. *Carter v. Ford Motor Company*, 121 F.3d 1146 (8th Cir. 1997).
37. *Gay v. Gilman Paper Company*, 125 F.3d 1432 (11th Cir. 1997).
38. *Reich v. Midwest Plastic Engineering*, 934 F. Supp. 266 (W.D. Mich. 1996), *aff'd without op.*, 113 F.3d 1235 (6th Cir. 1997).
39. *Kaylor v. Fannin Regional Hospital*, 946 F. Supp. 988 (N.D. Ga. 1996).
40. *Sousa v. Orient Arts, Inc.*, W.L., 5 Wage & Hour Cas.2d (BNA) 383 (S.D.N.Y. 1999).
41. *Douglas v. E. G. Baldwin & Associates*, 150 F.3d 604 (6th Cir. 1998).
42. See also *Muller v. The Hotsy Corporation*, 917 F. Supp. 1389 (N.D. Iowa 1996).
43. See also *Kilcrease v. Coffee County*, Alabama, 951 F. Supp. 212 (M.D. Ala. 1996).
44. *Satterfield v. Wal-Mart Stores*, 135 F.3d 973 (5th Cir. 1998), *reh'g en banc denied*, 140 F.3d 1040 (5th Cir. 1998).
45. *In-Sink-Erator v. Department of Industry, Labor and Human Relations*, 547 N.W. 2d 792 (Wis. Ct. App. 1996), *review denied*, 549 N. W.2d 734 (Wis. Ct. App. 1996).
46. *Sherry v. Protection, Inc.*, 981 F. Supp. 1133 (N.D. Ill. 1997).
47. See *Cline v. Wal-Mart Stores*, 144 F.3d 294 (4th Cir. 1998).

48. *Williams v. Shenango, Inc.*, 986 F. Supp. 309 (W.D. Pa. 1997).
49. See also [14] (employer failed to provide notice for FMLA medical certification and to post FMLA notice).
50. *Bluitt v. Eval Company of America*, 3 F. Supp.2d 761 (S.D. Tex. 1998).
51. *Seaman v. Downtown Partnership*, 991 F. Supp. 751 (D. Md. 1997).
52. *Cox v. Autozone, Inc.*, 990 F. Supp. 1369 (M.D. Ala. 1997).
53. *Wolke v. Dreadnought Marine, Inc.*, 954 F. Supp. 1133 (E.D. Va. 1997).
54. *Albert v. Runyon*, 6 F. Supp.2d 57 (D. Mass, 1998).
55. *Diaz v. Fort Wayne Foundry Corporation*, 131 F.3d 711 (7th Cir. 1997).
56. *Yousuf v. UHS of De La Ronde, Inc.*, 5 Wage & Hour Cas.2d 353 (E.D. La. 1999).
57. *Nunes v. Wal-Mart Stores*, 980 F. Supp. 1336 (N.D. Cal. 1997).
58. *Stoos v. One Call Comminations*, 141 F.3d 309 (7th Cir. 1998).
59. *George v. Associated Stationers*, 932 F. Supp. 1012 (N.D. Ohio 1996).
60. *Lempres v. CBS, Inc.*, 916 F. Supp. 15 (D.D.C. 1996).
61. *Viereck v. City of Gloucester*, 961 F. Supp. 703 (D.N.J. 1997).
62. *Pendarvis v. Xerox Corporation*, 3 F. Supp.2d 53 (D.D.C. 1998).
63. *Vargas v. Globetrotters Engineering*, 4 F. Supp.2d 780 (N.D. Ill. 1998).
64. *Blackwell v. Harris Chemical*, 11 F. Supp.2d 1302 (D. Kan. 1998).
65. *Watkins v. J & S Oil Company*, 977 F. Supp. 520 (D. Me. 1997).
66. *Lloyd v. Wyoming Valley Health Care*, 994 F. Supp. 288 (M.D. Pa. 1998).
67. *Hubbard v. Blue Cross Blue Shield*, 1 F. Supp.2d 867 (N.D. Ill. 1998).
68. *Tardie v. Rehabilitation Hospital of Rhode Island*, 168 F.3d 538 (1st Cir. 1999).
69. *Harvender v. Norton Company*, 4 Wage & Hour Cas.2d (BNA) 560 (N.D.N.Y. 1997).
70. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).
71. See also *Leary v. Hobet Mining*, 981 F. Supp. 452 (S.D.W. Va. 1997).
72. *Blumenthal v. Murray*, 995 F. Supp. 831 (S.D. Ill. 1998).
73. *Vanderhoof v. Life Extension Institute*, 988 F. Supp. 507 (D.N. J. 1997).
74. *Hodgens v. General Dynamics Corporation*, 144 F.3d 151 (1st Cir. 1998).
75. *Rhoads v. Federal Deposit Insurance Corp.*, 956 F. Supp. 1239 (D. Md. 1997); *Sakellarion v. Judge & Dolph, Ltd.* [8].
76. *Olsen v. Ohio Edison Company*, 979 F. Supp. 1159 (N.D. Ohio, 1997).
77. *Price v. Marathon Cheese Corporation*, 119 F.3d 330 (5th Cir. 1997).
78. *Seidle v. Provident Mutual Life Ins. Co.*, 871 F. Supp. 238 (E.D. Pa. 1994).
79. *Oswalt v. Sara Lee Corp.*, 74 F.3d 91 (5th Cir. 1996).
80. *Fisher v. State Farm Insurance*, 999 F. Supp. 886 (E.D. Tex. 1998).
81. *Roberts v. Human Development Association*, 4 F. Supp.2d 154 (E.D.N.Y. 1998).
82. *Godwin v. Rheem Manufacturing Co.*, 15 F. Supp.2d 1197 (M.D. Ala. 1998).
83. *Bauer v. Dayton-Walther Corp.*, 118 F.3d 1109 (6th Cir. 1997).
84. *Murray v. Red Kap Industries*, 124 F.3d 695 (5th Cir. 1997).
85. *Vasconcellos v. Cybex International*, 962 F. Supp. 701 (D. Md. 1997).
86. *Santos v. Shields Health Group*, 996 F. Supp. 87 (D. Mass, 1998).
87. *Hott v. VDO Yazaki Corp*, 922 F. Supp. 1114 (W.D. Va. 1996).
88. *Bond v. Abbott Laboratories*, 7 F. Supp.2d 967 (N.D. Ohio 1998).
89. *Thorson v. Gemini, Inc.*, 123 F.3d 1140 (8th Cir. 1997), *on remand summ. judgment granted*, 998 F. Supp. 1034 (N.D. Iowa 1998).

90. *Rock Island County*, 104 Lab. Arb. (BNA) 1127 (1995) (Witney, Arb.).

91. *Thompson v. Unemployment Comp. Bd.*, 687 A.2d 1 (Pa. Commw. Ct. 1997).

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