

**LEADING ANSWERS TO LEADING QUESTIONS:**  
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**FAMILY AND MEDICAL LEAVE ACT - A ROAD MAP**

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by  
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**INTRODUCTION**

The Family and Medical Leave Act has been on the books for over 13 years. Its dual purposes are to “balance the demands of the workplace with the needs of families” and “entitle employees to take reasonable leave for medical reasons.”<sup>1</sup>

In essence, the FMLA serves wholesome, widely-held ideals: The statute simply guarantees that a big employer, who presumably can afford it, accommodate employees taking time off to meet the most pressing needs of their immediate family. It seems safe to assume that average Americans (including those who make their way onto juries) have sympathy for employees who serve their families by taking FMLA leave and have little patience with employers who get in the way. But gaining access to the courtroom for an FMLA plaintiff often takes too long for the statute's leave provisions to serve their intended purposes, and enabling the jury to express its sympathy monetarily requires the crafting of hybrid suits combining FMLA claims with other claims in which emotional distress damages and punitive damages are available.<sup>2</sup>

**EQUAL EMPLOYMENT OPPORTUNITY**

The FMLA promotes equal employment opportunity for men and women in the workforce, while seeking to accommodate the legitimate interests of employers. As the United States District Court for the Northern District of Georgia recognized in *Walthall v. Fulton County School District*:

The purposes of the Act include balancing the demands of the workplace with the needs of families, entitling employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious

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<sup>1</sup> 29 U.S.C. §2601(b)(1), (2).

<sup>2</sup> R. Cockey, 12 American University Journal of Gender, Social Policy and the Law 1 (2003).

health condition; accomplishing these purposes in a manner that accommodates the legitimate interests of employers; and promoting the goal of equal employment opportunity for women and men.<sup>3</sup>

### **50 EMPLOYEE THRESHOLD**

Employees of private sector employers that employ 50 or more employees for 20 or more work weeks are generally going to be eligible for FMLA leave.

### **12 WEEKS OF LEAVE**

The FMLA provides employees with up to 12 weeks (480 hours) of unpaid, job-protected leave each year, and requires that group health insurance benefits be maintained during the leave. In giving a qualified employee such unpaid leave annually, the employee may use the leave to address certain medical crises and other important family events.

### **LIMITED FAMILY LEAVE BENEFITS**

Limited family leave benefits are provided by the FMLA. In connection with the birth of an employee's child or the placement of a child with the employee for adoption or foster care, a covered employee may take family leave. Leave entitlement does not extend to an employee seeking to take time off from work to care for a seriously ill in-law, live-in girlfriend or any significant other who does not come within the statutory definition of spouse, son or daughter of an employee.

### **SERIOUS HEALTH CONDITION**

The medical leave benefits that are protected by the FMLA are tied to the concept of a "serious health condition." An employee may take leave because of that employee's own serious health condition, if the condition is such that it makes the employee unable to perform the essential functions of his or her job. The employee may also take medical leave under FMLA to care for his or her spouse, daughter, son, or parent who is suffering from a serious health condition. While the definition of "serious health condition" has been addressed in the FMLA regulations and in case law, discussed in detail below, the general consensus is that any illness, injury, impairment, or physical or mental condition that involves either hospitalization or a period of care that extends more than three consecutive calendar days will constitute a serious health condition.

### **UNPAID LEAVE STANDARD**

The FMLA does not require that an eligible employee be paid while taking leave, only that the leave be made available under certain specified circumstances. One exception to the unpaid leave standard is the FMLA provision that accrued paid leave benefits may be applied, either at the employee's instance or the employer's instance, toward the 12-week FMLA ration. In this regard, an eligible employee is allowed to take as much of the FMLA leave, with pay, as is covered by

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<sup>3</sup> 18 F. Supp. 2d 1378, 1381 (N.D. Ga. 1998) (Thrash, J.).

accrued paid benefits, but is not permitted to “stack” FMLA leave by first exhausting his or her paid leave and then beginning the 12 weeks of unpaid FMLA leave. 29 U.S.C. §2612(d).

## **A ROAD MAP FOR CURRENT ISSUES IN FMLA PRACTICE**

With the above summary of the FMLA in mind, we will now highlight recent appellate and district court cases interpreting and applying key provisions of the FMLA, following an outline that tracks the applicable regulations promulgated by the Department of Labor:

### **1. Coverage Of Certain Employers**

#### **A. Private sector employers**

A 50-employee threshold test applies to private sector employers. A private sector employer is covered by the FMLA if it is engaged in commerce or any industry or activity affecting commerce and employs 50 or more employees for each working day during each of the 20 or more calendar work weeks in the current or preceding calendar year. 29 C.F.R. §825.104(a). Whether 50 employees are employed within the 75-mile radius used to determine eligibility is measured by the date the employee requests leave, and this determination is made on the basis of the number of employees maintained on the payroll.

Correspondingly, a person is not an “eligible employee” if he or she is employed at a worksite at which the employer employs less than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is less than 50. This statutory rule got down to a lesson in mathematics and timing in *Arvidson v. Wallace*,<sup>4</sup> after an employee sought and was denied FMLA leave for migraine headaches and ongoing medical problems resulting from an automobile accident. The employer sought to dismiss the employee’s FMLA claim on the ground that it did not employ the requisite 50 employees at its Wichita office, and that its offices in Overland Park and St. Louis were over 75 miles away from the Wichita office where the claimant employee worked. At the time the employee first requested leave and at the time she was terminated, the employer’s 401K records revealed that it employed 50 and then 51 employees, respectively, at its Wichita office at these two critical time periods.. The district court rejected the employer’s belated attempt to argue that 7 partners were working in the Wichita office during these time periods, an attempt which, if successful, would have brought the total number below the requisite number of 50 needed to trigger FMLA coverage. Finding no evidentiary support for this effort to massage the numbers, the district court concluded that there was a genuine issue of material fact as to the claimant’s status as an eligible employee and denied the employer’s motion for summary judgment.

#### **B. State and local government employers**

The term “employer” as defined under the FMLA encompasses any “public agency”, which is defined under the regulations as the government of a state or political subdivision of the state. A state or a political subdivision of a state counts as a single employer, a county is a single employer, and a municipality is a single employer. Regardless of the number of workers who come within the

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<sup>4</sup> 2006 U.S. Dist. LEXIS 6149 (D. Kan. Feb. 16, 2006).

ranks of a particular public agency, all public agencies are governed by the FMLA. All state and local government eligible employees are thus entitled to 12 weeks of unpaid leave in a 12-month period under the FMLA by virtue of their inclusion within the definition of “public agency.”

If a question arises as to whether a particular entity is a public agency or a private employer, applicable regulations promulgated by the Department of Labor, including 29 C.F.R. §825.109(b), point to several factors:

- Does the agency have taxing authority?
- Is the Chief Administrative Officer or board elected by the voters at large?
- Is the officer or board’s appointment subject to approval by an elected official?

If a question is raised as to whether a public agency is part of two competing agencies, the United States Census Bureau’s Census of Governments is determinative of the issue under 29 C.F.R. §825.108(c).

Similar to the FLSA’s personal staff exemption, under the FMLA personal staff members of public officeholders are excluded from coverage.<sup>5</sup>

## 2. Employee Eligibility Under FMLA

Under the FMLA, an eligible employee who has worked 1250 hours over a 12-month period is eligible for FMLA. This entitlement is to 12 work weeks of leave during any 12-month span, but it is on narrowly prescribed grounds. The most commonly used formula for establishing a “12-month period” under the FMLA is the “rolling method” by which the 12-month period is measured backward from the date the employee takes FMLA leave. 29 C.F.R. §825.200(b). Under 29 C.F.R. §825.110(d), once an employer has confirmed that an employee is eligible to take FMLA leave, “the employer may not subsequently challenge the employee’s eligibility.” The 11<sup>th</sup> Circuit invalidated 29 C.F.R. §825.110(d), reasoning that this regulation ignores FMLA’s eligibility standards.<sup>6</sup>

An employee’s eligibility under the FMLA is “not affected by subsequent changes in the number of employees at the employer’s worksite.”<sup>7</sup> The purpose of this requirement, evident from the statutory language, “is to fix the date for determination of an employee’s eligibility for FMLA benefits, and to protect employees who qualify for leave when the request is made from losing eligibility if there is a reduction in the work force thereafter.”<sup>8</sup>

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<sup>5</sup> See *Rutland v. Pepper*, 404 F. 3d 921 (5th Cir. 2005)(administrative assistant to chancery clerk not eligible employee under FMLA).

<sup>6</sup> See *Brungart v. BellSouth Telecommunications, Inc.*, 231 F.3d 791 (11th Cir. 2000), cert. denied, 121 S.Ct. 1998 (2001); accord, *Woodford v. Community Action of Greene County, Inc.*, 268 F.3d 51 (2d Cir. 2001)(holding that FMLA leave violates the statute’s eligibility rules and that the subject regulation is invalid).

<sup>7</sup> *Fisher v. Rizzo Bors. Painting Contractors, Inc.*, 403 F. Supp. 2d 593, 598 (E.D. Ky. 2005), citing 29 C.F.R. §825.110(f)

<sup>8</sup> *Grimsley v. Fiesta Salons, Inc.*, 2003 WL 11795, \*5(E.D. Mich. 2003).



### 3. Conditions For Family And Medical Leave

#### A. Birth or adoption

FMLA leave may be taken for the birth of an employee's child, and such leave may begin before the child is born. 29 C.F.R. §825.112(c). Under the FMLA, an eligible employee is entitled to take leave for purposes of "placement of a son or daughter with the employee for adoption for foster care." 29 U.S.C. §2611(a)(1)(B). The 5th Circuit in *Bocalbos v. National Western Life Insurance Company*<sup>9</sup> held that this provision of the FMLA envisions placement for adoption in a home before the adoption is finalized and does not apply to an employee whose adoption was finalized more than one year before the FMLA's effective date.

#### B. Serious health condition

An eligible employee under the FMLA may request leave "in order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition." 29 U.S.C. §2611(a)(1)(C). Under the applicable regulations, a "spouse" means a husband or wife under state law and includes a common law marriage where it is recognized under the applicable state law. 29 C.F.R. §825.113(a). The statutory term "parent" means a biological parent or someone who stands *in loco parentis* to an employee when the employee was a child, but an employee's mother-in-law does not fall within this definition. 29 C.F.R. § 25.113(b). FMLA leave does not extend to caring for a grandparent.<sup>10</sup> As used in this provision of the FMLA, "son" or "daughter" means biological, or adopted, or foster child, a step-child, a legal ward, or a child of person standing in loco parentis, who is either under age 18, or age 18 or older and incapable of self-care because of a mental or physical disability. 29 C.F.R. § 825.113(c). In *Navarro v. Pfizer Corp.*,<sup>11</sup> the 1<sup>st</sup> Circuit held that an EEOC interpretive rule articulating when an individual is disabled under the ADA does not govern FMLA claims where the parents seek leave in order to care for a disabled adult child. The applicable regulation, 29 C.F.R. §825.113(c)(1), provides that whether a child is "incapable of self-care" turns on whether the child needs aid in his or her "activities of daily living", which include such activities as grooming and hygiene, bathing, dressing, and eating.

Leave taken in response to a "serious health condition" may include time confined to a hospital, hospice, or residential medical facility. In *Kaylor v. Kannin Regional Hospital, Inc.*,<sup>12</sup> the district court held that a degenerative back condition qualified as a "serious health condition" for purposes of FMLA leave. In *Sander v. May Department Stores Company*,<sup>13</sup> a discriminatory discharge claim brought by an employee who was fired after undergoing sex reassignment surgery raised a genuine issue of material fact of whether the employee suffered from a "serious health condition" under the FMLA, precluding summary judgment. "Serious health conditions" have been

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<sup>9</sup> 162 F.3d 379 (5th Cir. 1999).

<sup>10</sup> *Bauer v. Dayton-Walther Corp.*, 910 F. Supp. 306(E.D. Ky. 1996).

<sup>11</sup> 261 F.3d 90 (1st Cir. 2001).

<sup>12</sup> 946 F. Supp 988 (N.D. Ga. 1996).

<sup>13</sup> 315 F.3d 940 (8th Cir. 2003).

held to include restorative dental surgery after an accident, removal of cancerous growths, prenatal care, atrial fibrillation, and an upset stomach, and a minor ulcer.<sup>14</sup>

When an employee seeks leave under the FMLA to care for his or her own illness, the employee must demonstrate an inability to perform the job. This can be shown by a health care provider certifying either that the employee is unable to work at all or that the employee is “unable to perform any of the essential functions” of his or her job. 29 C.F.R. §825.115. A health care provider within the meaning of the FMLA means a medical doctor or a doctor of osteopathy authorized by applicable state law to practice medicine or surgery, or other persons deemed by the Secretary of Labor fit to deliver health care services. 29 U.S.C. §2601(6).

FMLA leave may also be taken to care for a family member. “Care” is defined under the FMLA regulations to mean both physical and psychological care. An employee can take leave when called upon to furnish care to a family member who is unable to attend to his or her own basic “medical, hygienic, or nutritional needs or safety.” 29 C.F.R. §825.116(a). An employee may request FMLA leave to fill in for a caregiver seriously in need of a respite from care-giving duties or to make arrangements to place an aged parent in a nursing home. 29 C.F.R. §825.116(b).

#### **4. Maintenance Of Health Benefits**

While an employee is on FMLA leave, the employer is required to maintain the employee’s coverage under any “group health plan” at the same level and under the same terms as when the employee is working. 29 U.S.C. §104(c). Even if the employer is obligated to maintain health benefits for an employee who is on FMLA leave, however, the employee must still pay his or her share of premiums. Further, if the FMLA leave is also paid leave, the employee’s share will be paid in the normal fashion, usually by way of a payroll deduction. 29 C.F.R. §825.210(b).

When FMLA leave is unpaid, applicable regulations provide several ways to structure an on-leave employee’s payment of health insurance premiums:

- 1) Payment comes due the same day such sums are deducted from the payroll;
- 2) Payment comes due on the same schedule as payments are made under COBRA;
- 3) Payments are prepaid under a cafeteria plan selected by the employee; and
- 4) Following the employer’s rule governing payment by employees “on leave without pay”; or
- 5) Any policy both the employer and employ agree upon.

29 C.F.R. §825.210(c).

If an employee who is on unpaid FMLA leave fails to return to work after the FMLA leave expires, the employer may be entitled to seek reimbursement for its share of the health insurance premiums that it paid on behalf of the employee taking leave. 29 C.F.R. §825.213(a). An employer may not recover its share of health insurance premiums, however, for any period of FMLA leave that

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<sup>14</sup> See *Hodgens v. General Dynamics Corporation*, 144 F.3d 151 (5th Cir. 1998); *Thorson v. Gemini, Inc.*, 998 F. Supp 1034 (N.D. Ia. 1998); 29 C.F.R. §825.114(c).

is covered by paid leave. Further, the employer cannot recover its share of premiums if the employee fails to return to work either because of a serious health condition or for other reasons beyond the employee's control. 29 C.F.R. §825.213(a)(1), (2). Examples of the various grounds that will excuse an employee's failure to return to work once his or her FMLA leave has expired, as set forth in the applicable regulations, include the following:

- 1) The employee's spouse is abruptly transferred to a job over 75 miles away;
- 2) The employee is needed to care for a relative suffering from a serious health condition;
- 3) The employee is laid off while on leave; and
- 4) A "key employee" elects not to return to work after notice that reinstatement would grievously injure the employer.

29 C.F.R. §825.213(a)(2).

What if the employee is prevented from returning to work by reason of a serious health condition? An employer under these circumstances may insist upon medical certification of the serious health condition within 30 days, and if the medical certification is not forthcoming, it may recover its share of health insurance premiums paid during the unpaid FMLA leave. 29 C.F.R. §825.213(a)(3).

## **5. Employee Rights When Returning From Leave**

An eligible employee who takes leave under the FMLA is entitled to be restored to the job he or she held before the leave or to an equivalent position with the same benefits, pay, and other terms and conditions of employment. 29 U.S.C. §104(a)(1). Even though the returning employee may end up with the same position that he or she held before leave, the employee enjoys no entitlement to the old job. 29 C.F.R. §825.214(b). A returning employee will not be entitled to reinstatement if it can be proven that the employee fraudulently obtained FMLA leave. 29 C.F.R. §825.312(g).

The applicable FMLA regulations make it clear that in order for a job to be deemed an "equivalent position", it must entail "the same or more substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority." 29 C.F.R. §825.215(a).

In addition to returning to a job in an equivalent position, a returning employee may also be able to claim any unconditional pay raises that were put unto effect during the FMLA leave period, but pay raises that are tied to seniority or work performed need not be granted unless such is the employee's policy. The employee returning from FMLA leave is entitled to be restored to a job with the same pay premiums, such as a shift differential or overtime. 29 C.F.R. §825.215(c).

In *Hoge v. Honda of America Manufacturing, Inc.*,<sup>15</sup> the 6<sup>th</sup> Circuit held that an employer violated the FMLA when it refused to reinstate an employee until one month after she was prepared

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<sup>15</sup> 384 F.3d 238 (6th Cir. 2004).

to return from medical leave. In *Mitchell v. Dutchmen Manufacturing, Inc.*,<sup>16</sup> the 7<sup>th</sup> Circuit held that an employer was not in violation of FMLA when a returning employee received the same pay and benefits and had duties in the new job that remained substantially similar. In *Rinehimer v. Cemcolift, Inc.*,<sup>17</sup> the 3<sup>rd</sup> Circuit held that an employer did not violate the FMLA when it refused to reinstate an employee who needed to wear a respirator, reasoning that the employee was unable to perform the essential functions of his former job and that the FMLA did not require a reasonable accommodation, unlike the ADA. In *Dierlam v. Wesley Jessen Corp.*,<sup>18</sup> an employer was held to have violated the FMLA when it cut a worker's "stay bonus" awarded to employees who remained actively employed" when a new company bought the firm, because the worker at that time was on FMLA leave.

## 6. Key Employees

The FMLA defines the term "key employee" in 29 U.S.C. §104(b)(2) as:

A salaried eligible employee who is among the highest paid ten percent of the employees employed by the employer with 75 miles of the facility at which the employer is employed.

An employer may deny reinstatement to a key employee who is out on FMLA leave under certain conditions, set forth in 29 U.S.C. §104(b)(1):

- 1) Denial of reinstatement is necessary to prevent substantial and grievous economic injury to the operations of the employer;
- 2) The employer gives notice to the employee of its intent to deny restoration on such basis at the time the employer determines that such injury would occur; and
- 3) In any case in which leave has already commenced, the employee is not to return to employment after receiving such notice.

A "key employee" must be a salaried employee, which in turn means those employees who are exempt from the minimum wage and overtime requirements of the FSLA as executive, administrative, and professional employees. 29 C.F.R. §541.118. In determining whether an employee is "among the highest paid ten percent", all employees, salaried and unsalaried, eligible and ineligible, must be taken into account if they work for the employer within 75 miles of the work site, and in this calculation, earnings include wages, premium pay, incentive pay, and bonuses, but does not include stock options, benefits, or perquisites. 29 C.R.F. §825.217(c)(1).

In *Kelly v. DecisionOne Corp.*,<sup>19</sup> the Court held that it was reasonable for an employer to decide that the absence of a key employee would cause the company substantial economic injury and that the employer properly notified the key employee that she could be replaced during her leave.

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<sup>16</sup> 389 F.3d 746 (7th Cir. 2004).

<sup>17</sup> 292 F.3d 375 (3rd Cir. 2002).

<sup>18</sup> 222 F.Supp. 2d, 1052 (N.D. Ill. 2002).

<sup>19</sup> 2000 WL 184309 (E.D. Pa. 2000).



In *Panza v. Grappone Companies*,<sup>20</sup> the Court held that an employer could not terminate a key employee who was out on FMLA leave unless it informed the employee of his or her status when leave was requested.

## **7. Duties Of Employer Under FMLA**

The FMLA poses substantial duties upon employers to make sure that their workers are aware of FMLA benefits. A covered employer is required to post a notice of FMLA benefits in the workplace. If an employee makes a request for leave in connection with a potentially covered benefit, such as the employee with his own serious health condition or the serious health condition of a family member, or the birth or placement of a child, the employer is under a duty to inform the employee that FMLA leave may be available and to assist the employee in making the application for FMLA leave. The employer must not harass or retaliate against the employee exercising FMLA rights. An employee returning from FMLA leave must be given his or her old job back, and may not be subjected to any form of punishment, demotion, reduction in pay, or termination by reason of having taken FMLA leave in the first instance.

There are essentially two types of actions that may be brought by an aggrieved employee for alleged violations of the FMLA. These include an interference claim, as where an employer “interferes with” the exercise of the employee rights by refusing to authorize FMLA leave or by discouraging the employee from taking such leave. 29 C.F.R. §825.220(b). The two types of actions are discussed in greater detail at 9., *infra*.

## **8. Duties Of Employee Under FMLA**

### **A. Employee notice obligations**

Under the FMLA, an eligible employee must provide notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of that leave. When leave is foreseeable based on planned medical treatment, the FMLA requires the employee to provide the employer with not less than 30 days advance notice, if practicable. 29 U.S.C. 2612(e)(2). When the employee’s need for leave is not foreseeable, however, the advance notice requirement is inapplicable, and the employee need only provide the employer with notice sufficient to make the employer aware that the employee’s absence is due to a potentially FMLA-qualifying reason. To fulfill the notice requirements of the FMLA, an employee need not expressly assert rights under the FMLA or even mention the FMLA when requesting leave. It is sufficient that the employee state that leave is needed because of a serious health condition or other qualifying reason, such that the employer is reasonably apprised of the request to take time off for such reason.

In *Cavin v. Honda of America Manufacturing, Inc.*,<sup>21</sup> an employee sustained injuries as a result of a motorcycle accident, and upon release from the hospital, the employee called the employer, reported what had happened, and advised that he would be off work the next day. The

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<sup>20</sup> 2000 WL 1700143 (D.N.H. 2000).

<sup>21</sup> 2003 WL 22316812 (6th Cir. 2003).

employee did not contact the employer's leave coordination department as required by the employer's personnel policies, and as a consequence, the leave was deemed an absence without permission. In this case, after the employee had returned home from the hospital, he had called the plant and told plant security about the accident, his return home from the hospital and the need to be absent. The next day the employee visited a second doctor, and again called in after being absent and placed that call on a daily basis during the period that the doctor prescribed for the employee to be off work. It was only when the employee returned to work, over three days after his first absence, that he formally notified the leave coordination department. The court noted that the employer's supervisor and peers knew about the motorcycle accident and inquired about his progress. The employer disallowed part of the leave due to the employee's failure to notify the leave coordination department. Later requests for leave were approved when the employee's extreme shoulder pain resulting from the motorcycle accident persisted. The doctor's certificate for one leave was incomplete, and the doctor failed to timely submit a completed form. Given the earlier violation, coupled with counseling and a warning, this last violation led to the employee's discharge. The employee invoked the FMLA's interference provision, 29 U.S.C. §2615(a)(1), which provides that "it shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under [the FMLA]"

In attacking the employer's refusal to recognize the employee's early leave as qualified under the FMLA, the employee had the burden of proving the elements of an interference claim:

- eligible employee;
- covered employer;
- entitlement to FMLA leave;
- employee notice to the employer of an intent to take the leave; and
- denial of the leave.

In *Cavin*, the issue before the 6<sup>th</sup> Circuit was this fourth requirement, notice to the employer, with respect to which the 6<sup>th</sup> Circuit held that "the FMLA does not permit an employer to limit his employee's FMLA rights by denying them whenever an employee fails to comply with internal procedural requirements that are more strict than those contemplated by the FMLA."<sup>22</sup>

Normally, it would have appeared that the FMLA would not have prevented the employer from taking that leave into negative account when disciplining the employee for absenteeism. The 6<sup>th</sup> Circuit held, however, that the FMLA establishes the basic and minimal procedures and standards for notifying the employer of the need and the basis for leave, and while an employer is free to draft more sophisticated procedures and standards, it must honor any notice that satisfies the FMLA.

After *Cavin v. Honda*, employers who insist that employees comply with a centralized leave process must do so in a way that does not conflict with the FMLA. All communications about leave should accordingly be channeled to the entity, such as a leave coordination department, and that entity in turn should take the initiative to clarify any ambiguity about the employee's communication. *Cavin* points out the practical realities of an FMLA leave situation, where an employee is under a great deal of stress, may have a family member demanding the employee's

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<sup>22</sup> 2003 WL 22316812, \*5.

attention, or may be faced with a potentially crippling or fatal disease that must be treated, so that requiring the employee to give notice to the employer in a particular form, directed to a particular entity or containing certain magic words or phrases may simply be asking too much of a stressed employee. A centralized leave process may still be appropriately maintained, but an employer who demands cooperation from the employee cannot make the employee jump through hoops when a sensible and rational effort by the employer to facilitate the leave process is actually called for. On the other hand, if an employee willfully refuses to cooperate, the employee should be disciplined for insubordination, provided the employee has been given every chance to comply with clearly communicated rules and regulations imposed by the employer.

A recent decision illustrates that the advance notice requirement will not easily be turned into a trap for the unwary employee, nor will it be expanded into an unwarranted exemption for employers. In *Beffert v. Pennsylvania Department of Public Welfare*,<sup>23</sup> the district court held that an employee who had been recently hired and who had announced her pregnancy and requested leave that would take effect more than one year after initial employment could legally seek the protection of the FMLA, despite her subsequent termination that ended her employment well short of one year. The employer, the State Department of Public Welfare, had argued that the employee's FMLA claim should be dismissed because she had been employed for less than a year at the time of the alleged adverse employment actions. As noted above, in order to be eligible for FMLA protection, an employee must have been employed with the employer at least 12 months and must have worked for at least 1250 hours during the 12-month period immediately preceding the leave requested. Here the employer claimed that the employee's expectation that she still would have been employed by the date of her expected delivery was too tenuous and speculative to make her an "eligible employee" for FMLA purposes. The employee maintained, however, that her expectation of employment, if not for the premature termination, made her an eligible employee under the FMLA. The district court looked to the applicable statute, 29 U.S.C. §2611(2)(A)(i), and noted that while the employee could not be an eligible employee unless "the date leave commences" is after the employee has worked at least 12 months, the FMLA also requires that an employee provide the employer with not less than 30 days notice of the date leave is to begin where such notice is practicable. This 30-day notice requirement permits the employer time to make arrangements for the departure of the employee requesting leave. The district court noted that the statutory reference to "employee" rather than "eligible employee" was a recognition that some employees would and should give notice of future leave before they have been on the job for 12 months. The court reasoned that since the FMLA contemplates notice of leave in advance of becoming an eligible employee, the statute necessarily must protect from retaliation, both currently non-eligible employees who give such notice of leave to commence once they become eligible employees. The advance notice requirement under 29 U.S.C. §2612(e), would otherwise become a trap for newer employees who comply with this provision of the FMLA and would afford a significant exemption from liability for employers. The district court in *Beffert* did not think that Congress intended such an anomalous result. The district court's finding in favor of the employee allows recently hired employees to request leave prior to attaining one year of tenure with the employer and provides such employees with some assurance that they are not without enforceable rights if the employer retaliates because of their leave request.

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<sup>23</sup> 2005 WL 906362 (E.D. Pa. 2005).

## B. Medical certification rules

The FMLA includes a mechanism by which an employer may ascertain whether an employee's absence qualifies as FMLA leave: "An employer may require that a claim that an employee is unable to return to work because of the continuation, recurrence, or onset of [a] serious health condition ...be supported by a certification issued by the [employee's] health care provider." 29 U.S.C. §2614(c)(3)(A), cited and discussed in *Strickland v. Waterworks*,<sup>24</sup>

When a serious health condition prompts an employee to request FMLA leave, the employer can insist upon medical certification to support the request for leave. 29 U.S.C. §103(a). This medical certification must contain certain information described in 29 U.S.C. §103(b), including the following:

- 1) When the serious health condition arose;
- 2) The probable duration of the illness;
- 3) All medical facts about the illness known to the health care provider;
- 4) A statement that the employee is needed to care for a family member or an estimate of how much the employee's time is vital;
- 5) A statement that the employee is unable to perform his or her job; and
- 6) In case certification is for intermittent leave, or leave on a reduced leave schedule, for planned medical treatment, the treatment dates and the length of such treatment must be provided:
  - a) For certification of intermittent leave, or leave on a reduced schedule, the certification must include a statement of the medical need for leave and the time frame for the intermittent leave, or reduced leave schedule; or
  - b) In the case of certification for intermittent leave, or leave on a reduced leave schedule, a statement that the employee's leave is necessary for the care of a family member with a serious health condition, or will aid in that family member's recovery, and the duration and schedule of such leave.

An optional form has been developed by the Department of Labor for employees to use in securing medical certification from health care providers, and employers may not insist on additional information. This form sets forth the following information, described in 29 C.F.R. §825.306(a):

- 1) The onset of the illness and the health care provider's best medical judgment on the likely duration of the condition;
- 2) The prescribed treatment;
- 3) Where the hospitalization is needed;
- 4) When the employee's own illness prompted the FMLA leave, the health care provider must certify that the employee is unable to perform the essential functions of the job;

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<sup>24</sup> 239 F.3d 1199 (11th Cir. 2001).



- 5) When a family member is ill, certification must verify that the patient is in need of aid for basic medical, hygiene, nutritional needs, safety or transportation, or his or her presence will speed physical or psychological recovery; and
- 6) The employee must indicate the care that he or she will provide and estimate the time frame.

29 C.F.R. §306.

When an employer has been provided a fully completed medical certification, the employer may nonetheless insist on a second opinion at its own expense. 29 U.S.C. §103(c)(1). The selection of the second health care provider is up to the employer, but that provider cannot be employed on a regular basis by the employer. 29 C.F.R. §825.307(a). If the two medical certification opinions clash, the employer, at its expense, can insist upon a tie-breaking third opinion, but the selection of the third health care provider must be approved in good faith by both the employer and the employee. The employer will be bound by the first certification if it acts in bad faith, such as vetoing all doctors on a list of specialists in the field in question. 29 C.F.R. §825.307(c). Similarly, the employee will be bound by the second certification opinion if the employee makes no good faith effort to reach an accord, such as refusing to see a doctor in the specialty in question.

Once an employer has agreed with the medical certification that an employee's illness is a serious medical condition, the employer may nonetheless insist that the employee obtain subsequent recertifications "on a reasonable basis". 29 U.S.C. §103(e). Under the applicable regulations, an employer may not request recertification more than once a month, unless the employee requests an extension of leave, circumstances described by the original certification have significantly changed, or the employer learns of facts that call into question the continuing validity of the certification. 29 C.F.R. §825.308(a)-(c).

In *Sims v. Alameda-Contra Costa Transit District*,<sup>25</sup> the Court held that where an employer did not seek a subsequent medical opinion within a reasonable time after the employee submitted his initial certification of a serious health condition, the employer could not later call and question the validity of the initial medical certification submitted by the employee, if the initial medical certification was sufficient. In *Rhoads v. FDIC*,<sup>26</sup> the 4th Circuit held that while an employer may seek a second or third opinion, it need not trigger this procedure or be forever foreclosed from contesting whether the worker suffered from a serious health condition.

## 9. **FMLA Enforcement**

In describing an employee's claims under the FMLA, the Courts have recognized interference claims and retaliation claims, although those labels do not appear anywhere in the Act.<sup>27</sup>

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<sup>25</sup> 2 F. Supp. 2d 1253 (N.D. Cal. 1998).

<sup>26</sup> 257 F.3d 373 (4th Cir. 2001).

<sup>27</sup> See *O'Connor v. PCA Family Health Plan, Inc.*, 200 F.3d 1349, 1352 (11th Cir. 2000).

## A. Retaliation claims

An aggrieved employee may assert a retaliation claim, predicated upon a showing that the employer has dismissed or discriminated against employees who have filed any charge or instituted or caused to be instituted any proceeding under or related to the FMLA. 29 U.S.C. §105(b). For example, if an employee furnishes information or testifies on matters relating to the FMLA, the employee is protected against employer retaliation. 29 U.S.C. §105(b)(2), (3).

Retaliation claims that are based on circumstantial evidence shall be analyzed under the *McDonnell Douglas* framework of shifting burdens of proof.<sup>28</sup> An aggrieved employee may establish a *prima facie* case of retaliatory discharge under the FMLA by showing that:

- 1) He availed himself of a protected right under the FMLA;
- 2) He was adversely affected by an employment decision; and
- 3) There is a causal connection between his exercise of a right under the FMLA. and the adverse employment decision.

The burden then shifts to the defendant employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action. If the defendant employer is able to articulate such a reason, then the aggrieved employee has the burden of showing that the articulated reason is a pretext for discrimination. In order to establish the requisite causal link, the employee must proffer evident that is sufficient to raise the inference that his protected activity was the likely reason for the adverse action.

In *Strickland v. Waterworks and Sewer Board of City of Birmingham*,<sup>29</sup> a service department supervisor was terminated nine days after he took leave. The 11th Circuit held that in a retaliation claim under §105(a) of the FMLA, 29 U.S.C. §2615(a), the appropriate method to determine whether the supervisor had established a *prima facie* case of discriminatory intent on the part of his employer was a three-prong test in which the employee showed that:

- 1) He or she availed himself or herself of a protected right under the FMLA;
- 2) He or she was adversely affected by an employment decision; and
- 3) There was a causal connection between the employee's protected activity and the employer's adverse employment action.

In *Strickland*, the 11<sup>th</sup> Circuit concluded that the supervisor could not survive summary judgment on his retaliation claim because he failed to establish the third element of a *prima facie* case. The Court reasoned that the supervisor alleged in his complaint that before leaving the work place, he had told his supervisor that he needed FMLA leave because he was suffering a diabetic attack. The record presented on summary judgment, however, contained no support for this allegation, and the supervisor in fact failed to refer to the FMLA at any time prior to the decision to discharge him. The supervisor had contended that his absence of notice was not fatal, because the short time lapse between his leave and the decision to fire him constituted circumstantial evidence

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<sup>28</sup> See *Kaylor v. Fannin Regional Hospital, Inc.*, 946 F.Supp. 988 (N.D. Ga. 1996).

<sup>29</sup> 239 F.3d 1199 (11th Cir. 2001).

that his employer was retaliating against him for seeking FMLA protection and thus satisfied the third element of a prima facie case. The 11<sup>th</sup> Circuit concluded, however, that such evidence could not satisfy the third element in a case in which the un rebutted evidence was that the decision maker did not have knowledge that the employee had engaged, or was attempting to engage, in protected conduct, and the decision maker in this case could not have been motivated to retaliate by something unknown to him or her.

The 11<sup>th</sup> Circuit found in *Strickland* that the record did present an interference claim sufficient to withstand summary judgment, and that in order to state a claim that an employer had interfered with the substantive FMLA right, “a plaintiff need only demonstrate that he was entitled to but denied the right. He does not have to allege that his employer intended to deny the right; the employer’s motives are irrelevant.” *Id.* at 1207.

The elements of a *prima facie* case of retaliation and the burden-shifting analysis have been discussed above. Intent to retaliate must be shown in such a claim. As the district court put it in *Johnson v. Morehouse College*,<sup>30</sup>

Unlike an interference claim, a plaintiff who asserts a retaliation claim must prove that the employer acted with the requisite intent to retaliate.

In *Nance v. Buffalo’s Cafe of Griffin, Inc.*,<sup>31</sup> the Court applied the *McDonnell Douglas* burden-shifting analysis to the plaintiff employee’s retaliation claim, and held that no reasonable juror could conclude that the employer’s legitimate, non-retaliatory reasons for discharging the employee were a pretext for unlawful retaliation. In this case, although the Court granted summary judgment in favor of the employer with respect to the retaliation claim, it denied summary judgment with respect to the employee’s interference claim, reasoning that “this is so because the intent necessary to demonstrate retaliation is not required to show interference with a right under the FMLA.”

In *Hurlbert v. St. Mary’s Health Care System, Inc.*,<sup>32</sup> the 11<sup>th</sup> Circuit addressed the required elements of a prima facie showing of retaliation and the burden-shifting analysis under *McDonnell Douglas*. In holding that the employee had presented evidence of pretext sufficient to preclude summary judgment with respect to his retaliation claim, the Court stated:

To show pretext, a plaintiff must come forward with evidence, including the previously produced evidence establishing the prima facie case, sufficient to permit a reasonable fact finder to conclude that the reasons given by the employer were not the real reasons for the adverse employment decision. ... The close temporal proximity between *Hurlbert*’s request for leave and his termination - no more than two weeks, under the broadest reading of the facts, is evidence

<sup>30</sup> 199 F.2d 1345, 1359 (N.D. Ga. 2001).

<sup>31</sup> 2005 U.S. Dist. LEXIS 20429 (N.D. Ga. 2005).

<sup>32</sup> 2006 U.S. App. LEXIS 3733 (11th Cir. February 16, 2006).

of pretext, though probably insufficient to establish pretext by itself. ...We have recognized that an employer's failure to articulate clearly and consistently the reason for an employee's discharge may serve as evidence of pretext. Similarly, an employee's deviation from its own standard procedures may serve as evidence of pretext.

Evidence that is relevant to causation includes proof that the defendant employer treated the employee differently from similarly-situated employees or that the adverse employment action was taken shortly after the employee's exercise of protected rights under the FMLA<sup>33</sup>

## **B. Interference claims**

The FMLA makes it unlawful "for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided by the FMLA." 29 U.S.C. § 2615(a)(1).

In *Strickland*, the 11<sup>th</sup> Circuit found that the record did present an interference claim sufficient to withstand summary judgment, and that in order to state a claim that an employer had interfered with the substantive FMLA right, "a plaintiff need only demonstrate that he was entitled to but denied the right. He does not have to allege that his employer intended to deny the right; the employer's motives are irrelevant." *Id.* at 1207.

The 11<sup>th</sup> Circuit recently addressed an interference claim in *Hurlbert v. St. Mary's Health Care System, Inc.*,<sup>34</sup> in which the 11<sup>th</sup> Circuit reversed a district court's dismissal of both interference and retaliation claims. The Court first noted that the FMLA, 29 U.S.C. §§ 2615(a)(1), 2617(a), creates two types of claims:

Interference claims, in which an employee asserts that his employer denied or otherwise interfered with his substantive rights under the Act, and retaliation claims, in which an employee asserts that his employer discriminated against him because he engaged in activity protected by the Act," citing *Strickland v. Waterworks and Sewer Board of the City of Birmingham*, 239 F.3d 1199, 1206 (11<sup>th</sup> Cir. 2001).

The Court in *Hurlbert* held that in order to establish an interference claim, it is not necessary for an employee to allege that the employer had the intent to deny the benefit. The motives of the employer are irrelevant. It is necessary only for an employee to show by a preponderance of the evidence that he was entitled to the leave benefit denied.

In *Throneberry v. McGehee Desha County Hospital*,<sup>35</sup> the 8<sup>th</sup> Circuit held that the FMLA does not impose strict liability on an employer for interference with FMLA rights, but rather

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<sup>33</sup> See *Nguyen v. City of Cleveland*, 229 F.3d 559, 563 (6th Cir. 2000); *Ford v. General Motors Corp.*, 305 F.3d 545, 554-55 (6th Cir. 2002).

<sup>34</sup> 2006 U.S. App. LEXIS 3733 (11th Cir. February 16, 2006).

<sup>35</sup> 403 F.3d 972 (8th Cir. 2005).



immunizes an employer who can prove that the interfering act would have occurred even in the absence of FMLA leave. In *Xinliu v. Amway Corporation*,<sup>36</sup> the 9<sup>th</sup> Circuit held that an FMLA violation can take place not only when leave is completely denied, but also when an employer discourages an employee from continuing leave or places conditions on leave that prevent the worker from taking FMLA leave at all.

## 10. Employer Record-Keeping Requirements

The FMLA imposes upon employers a duty to make, keep and preserve records bearing on their obligations under the Act in accordance with specific record keeping rules. 29 U.S.C. §106(b); 29 C.F.R. §516.2(a)(7).

No special form of records or special order is required, and an employer is not duty bound to alter its payroll or personnel record systems to comply. 29 C.F.R. §825.500(b). The applicable regulations provide an inventory of items that must be recorded, and an employer must save his records for three years on microfilm or in computer form from which reproductions are clear and identifiable by date or pay period:

- 1) Basic payroll and employee identifying data; rate of pay and terms of compensation; hours worked per pay period; and additions or deductions from pay and total pay amounts;
- 2) Dates of FMLA leaves;
- 3) Hours of FMLA if taken in increments of less than one full day;
- 4) Copies of employee notices requesting leave and notices afforded employees required by FMLA;
- 5) Documents detailing employee benefits or employer policies bearing on the taking of paid and unpaid leave;
- 6) Premium payments of employee benefits; and
- 7) Records of disputes between an employer and an employee over whether leave is FMLA leave or not.

29 C.F.R. §825.500(c).

Aside from the records that an employer is duty bound to maintain, an employer cannot be forced to submit the following:

Any books or records more than once during any 12-month period, unless the Secretary has reasonable cause to believe there may exist a violation of this title or any regulation or order issued pursuant to this title, or is investigating a charge pursuant to §107(b).

Aside from the above, an employer is not required to keep records of hours worked by exempt employees, i.e., those who are not covered by the FLSA. 29 C.F.R. §825.500(d). Records must be maintained, however, of those employees who take FMLA leave intermittently or on a

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<sup>36</sup> 347 F.3d 1125 (9th Cir. 2003).

reduced leave schedule, and an employer must not only preserve medical certifications, but must take steps to maintain confidentiality of all medical records. 29 C.F.R. §825.500(e).

## 11. Special Rules For Schools

The FMLA provides special rules governing instructional employees of “local educational agencies”, which include public elementary and secondary schools, where such employees take intermittent leave or leave on a reduced leave schedule close to the end of the semester. 29 U.S.C. §108(a)(1). These rules do not govern colleges and universities, trade schools, and pre-schools. 29 C.F.R. §825.600(a). For those schools that are covered by the special rules, FMLA’s 50-employee threshold test is inapplicable. To qualify as an eligible employee, however, the employee must work at a site where 50 or more employees work within 75 miles. An example provided by 29 C.F.R. §825.600(b) is where employees of a rural school would be ineligible for FMLA leave if the school employed fewer than 50 employees and there were no other schools within 75 miles. With regard to instructional employees who are covered by these special rules, the FMLA regulations expand those rules to cover “athletic coaches, driving instructors, and special education assistants, such as signers for the hearing impaired.” 29 C.F.R. §825.600(c). The special rules do not apply, however, to teacher assistants, aides, counselors, psychologists, curriculum specialists, cafeteria workers, maintenance workers, or bus drivers who are not chiefly teachers. 29 C.F.R. §825.600(c).

## 12. FMLA’s Interplay With Pregnancy Discrimination Act (PDA), Americans With Disabilities Act (ADA), And Other Laws

“[B]eing pregnant, as opposed to being incapacitated because of pregnancy, is not a single ‘serious health condition’ within the meaning of the FMLA.”<sup>37</sup> In *Cruz v. Publix Supermarkets, Inc.*, when the long-term employee learned that her adult daughter was pregnant and due to give birth on November 1, 2003, the employee requested two weeks of unpaid leave from October 31, 2003, until November 16, 2003, to travel out of state for the birth of her grandchild. When the employee learned that her daughter might deliver the baby early, the employee changed her travel plans to leave two weeks before her leave was scheduled to begin. When the employee was terminated for job abandonment after failing to return to work after her two weeks of approved leave was over, the employee filed a complaint alleging that her employer had improperly denied her FMLA leave to care for her pregnant daughter, who had a serious medical condition. Affirming the district court’s grant of summary judgment in favor of the employer, the 11<sup>th</sup> Circuit held that “the protections of the FMLA do not extend to an employee taking leave to care for his or her adult child simply because that child is pregnant, unless, for example, that child is incapacitated due to pregnancy.” Because Cruz’s daughter was over the age of 18, Cruz was required to prove that her daughter was “incapable of self-care because of a physical or mental disability,” in order to prevail on her FMLA claims, that is, she had to prove that her daughter was experiencing something beyond normal pregnancy. The 11<sup>th</sup> Circuit held that the employee was thus obligated to inform her employer that her daughter was experiencing complications due to her pregnancy, was unable to care for herself, or provide some other indication that her adult daughter was “incapable of self-care because of a mental or physical disability,” and that only then would the burden to inquire further shifted to the employer. Under the facts of this case, however, the employee did not provide the

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<sup>37</sup> *Cruz v. Publix Supermarkets, Inc.*, 428 F.3d 1379 (11th Cir. 2005)

employer with that kind of notice, did not volunteer additional information about her daughter's alleged pregnancy complications, but "merely offered her own belief that her daughter was going into labor, that her son-in-law had a broken collarbone, and that her daughter needed her help as reasons for the leave." The employee's desire to assist her adult daughter during the birth of her grandchild was "a condition which the FMLA does not cover." *Id.* at 1385.

In *Aubuchon v. Knauf Fiberglass, GMBH*,<sup>38</sup> the 7<sup>th</sup> Circuit similarly distinguished "being pregnant" from being incapacitated because of pregnancy, the former not being a "serious health condition" in the meaning of the FMLA.

The FMLA leaves all other federal and state anti-discrimination laws intact, and an employer is required to comply with whichever law grants the greater protection to employees. 29 U.S.C. §401(a).

Applicable regulations provide examples of the interplay between the Americans with Disabilities Act and the Family and Medical Leave Act. For a disabled employee, reasonable accommodation under the ADA might mean offering the employee a part-time job without health benefits. The FMLA entitles the employee to work a reduced leave schedule for 12 weeks with benefits intact. 29 C.F.R. §825.702(c). If an employee is qualified for FMLA leave, the employer may not force the employee to take a job without a reasonable accommodation in place of FMLA leave. 29 C.F.R. §825.702(d). If an employee is required to furnish certification of fitness for return to work, the ADA still demands that a fitness-for-duty physical be job-related. 29 C.F.R. §825.702(e). In *Thompson v. Cendant Corp.*,<sup>39</sup> the district court held that disciplining an employee for excessive absences due to disability did not violate the ADA where the employee exceeded FMLA leave. In *Oatman v. Fuji Photo Film USA*,<sup>40</sup> the 5<sup>th</sup> Circuit held that while there is some measure of overlap between the FMLA and ADA, there is no FMLA right to reinstatement with reasonable accommodation of disability.

### 13. FMLA Checklist: Terms Of Leave Under FMLA

The following FMLA checklist succinctly captures the essential requirements of the FMLA and can provide a beneficial screening mechanism for a preliminary assessment of the viability of a retaliation claim or an interference claim. This FMLA checklist is set forth in J. Sanchez and R. Klausner, *State and Local Government Liability* §9:14, at 9-49 (2005):

- 1) Disciplinary rules governing abuse of sick leave must conform to FMLA guidelines;
- 2) Employer should put into effect uniform practice of requiring medical excuses;
- 3) Employers are well-advised to refer employees claiming use of sick leave on FMLA basis to company-employed nurse-physician to ensure consistent review of claims;
- 4) Employer cannot interfere with benefits such as insurance or pensions for lawful FMLA claims;

<sup>38</sup> 359 F.3d 950, 952 (7th Cir. 2004).

<sup>39</sup> 130 F. Supp. 2d 1255 (N.D. Okla. 2001).

<sup>40</sup> 54 Fed. Appx. 413 (5th Cir. 2002)(unpublished opinion).

- 5) Employers should develop uniform rules for reassignment to work following FMLA leaves, particularly in cases of extended leaves for pregnancy or other long-term absences;
- 6) Where Americans with Disabilities Act and FMLA rights cross, employers must apply the more liberal rule to the benefit of the employee; and
- 7) Employers may insist that employees take paid leave in lieu of unpaid leave to discourage abuse of leave rights.

#### 14. FMLA And States' Rights

In *Nevada Department of Human Resources v. Hibbs*,<sup>41</sup> the United States Supreme Court upheld the Family and Medical Leave Act as applied to state employers. This decision was somewhat surprising, particularly in view of the Supreme Court's consistent pattern, up to that time, of invalidating the application of civil rights statutes to state actors in the name of sovereign immunity.<sup>42</sup>

Aside from this departure from a string of sovereign immunity decisions, the Court focused on the discrimination that women continue to experience in the workplace and the ways in which the FMLA draftsmen had designed the statute to remedy such discrimination. As the late Chief Justice Rehnquist explained: "Congress sought to adjust family leave policies in order to eliminate their reliance on and perpetuation of invalid stereotypes, and thereby dismantle persisting gender-based barriers to the hiring, retention, and promotion of women in the workplace."<sup>43</sup> Commentators have noted that the language in *Hibbs* was some of the Supreme Court's strongest language in the last two decades recognizing and condemning discrimination against women, particularly in light of the fact that it was written by Chief Justice Rehnquist, who, according to one admittedly speculating commentator, employed such forceful language due in part to his own recent experience. "His daughter is a single mother and several times this term, the 78-year-old Chief Justice left work early to pick up his granddaughters from school."<sup>44</sup> Those words used by the late Chief Justice bear repeating here:

Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. ... These mutually reinforcing stereotypes created a self-fulfilling cycle

<sup>41</sup> 538 U.S. 721 (2003), 123 S. Ct. 1972 (2003).

<sup>42</sup> See *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001)(invalidating suit against the State of Alabama under the Americans with Disabilities Act); *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000)(invalidating suit against state under Age Discrimination and Employment Act); *College Savings Bank v. Florida Prepaid Post-Secondary Ed. Expense Board*, 527 U.S. 666 (1999)(invalidating suit against state under Trademark Remedy Clarification Act); *City of Boerne v. Flores*, 521 U.S. 507 (1997)(invalidating suit under Religious Freedom Restoration Act); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996)(invalidating suit under Indian Gaming Regulation Act).

<sup>43</sup> *Hibbs*, 123 S. Ct. at 1981(n)(10).

<sup>44</sup> M. Selmi, *The Family and Medical Leave Act of 1993: Ten Years of Experience: Is Something Better Than Nothing? Critical Reflections on Ten Years of the FMLA*, 15 Wash. U. J.L. & Pol'y, n7(2004), citing Linda Greenhouse, *Evolving Opinions: Heartfelt Words from the Rehnquist Court*, New York Times, July 6, 2003, 4 (Week In Review) at 3.



of discrimination that forced women to continue to assume the role of primary care-giver, and fostered employers' stereotypical views about women's commitment to work and their value as employees. Those perceptions, in turn, Congress reasoned, lead to subtle discrimination that may be difficult to detect on a case-by-case basis. ... Creating an across-the-board route employment benefit for all eligible employees, Congress sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men. ... By setting a minimum standard of family leave for all eligible employees, irrespective of gender, the FMLA attacks the formerly state-sanctioned stereotype that only women are responsible for family care giving, thereby reducing employers' incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes.<sup>45</sup>

## 15. Statute Of Limitations

Under the FMLA, an employee asserting a violation is required to bring his or her claim within two years of the "last event constituting the alleged violation." 29 U.S.C. §2617(c)(1). If an employer has "willfully" violated the FMLA rights of the employee, however, the statute of limitations is extended to three years. 29 U.S.C. §2617(c)(2).

In *Samuels v. Kansas City, Missouri School District*,<sup>46</sup> the 8<sup>th</sup> Circuit held that because an employee had failed to demonstrate a willful violation of the FMLA by her school district employer, her FMLA claim was barred by the applicable two-year statute of limitations. The plaintiff, a teacher of mentally handicapped and learning disabled students, suffered an unfortunate series of accidents and injuries, first from a slip and fall while coming to the high school, then a car accident, then another slip and fall outside a restaurant, as a result of which she sought and obtained medical leave, sought but was denied a job accommodation under the ADA, and was ultimately transferred to another alternative school for students diagnosed with mental and behavioral disorders, one of whom kicked a chair in which she was sitting, causing pain to her back, ribs, neck, and left leg. Following extended medical leave, the plaintiff returned to work as an elementary school counselor until the following year when she again requested long-term leave of absence due to hypertension. She ultimately filed suit against the school district, claiming that it had violated the FMLA by refusing to restore her to the position she held or a comparable position when she returned to work.

The 8<sup>th</sup> Circuit held in *Samuels* that the definition for "willful" under the FMLA was the same as the Supreme Court's definition for "willful" in the context of the Fair Labor Standards Act, and that under that definition "the plaintiff must demonstrate the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute. *Id.* at \*12. Under this standard, the 8<sup>th</sup> Circuit held that the employee had failed to demonstrate that the school district employer knew or acted with reckless disregard as to whether its conduct violated the

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<sup>45</sup> 123 S. Ct. at 1982-83.

<sup>46</sup> 2006 U.S. App. LEXIS 3446 (8th Cir. February 14, 2006).

FMLA. At the time the employee returned to work, she performed light clerical duty for the remainder of the school year in the same position she held before her leave of absence. She worked on a reduced schedule and was given intermittent leave to attend physical therapy. After her request for a transfer to a school with handicap parking, room to perform stretching exercises, and an elevator or only one floor, she was transferred to a school that satisfied the majority of her criteria based on her employer's good faith belief that she had requested and agreed to be transferred there. The 8<sup>th</sup> Circuit concluded that its review of the record revealed no evidence or reasonable inference that the school district employer knew its actions were unlawful or showed reckless disregard for whether its conduct was prohibited by the FMLA when granting the employee's request for a transfer. The school district employer's general knowledge that the FMLA was "in the picture," did not constitute a willful violation of the statute.

In *Began v. Goldwell of New England, Inc.*,<sup>47</sup> the district court held that the plaintiff employee had presented sufficient facts from which a reasonable jury could conclude that the employer knowingly or recklessly disregarded FMLA requirements, thereby qualifying the plaintiff for the three-year period of limitations. In holding that the question of whether or not the employer had acted willfully was one for the fact finder, the district court stated:

The statute of limitations may be extended, however, from two years to three where a plaintiff shows a willful violation of FMLA. [T]o qualify for the three-year period, 'a plaintiff must show that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute.' In other words, 'the plaintiff must proffer evidence that (1) the defendant employer had actual knowledge of, or showed reckless disregard for, the requirements of the FMLA, and (2) intentionally disobeyed or ignored the law.'<sup>48</sup>

### CONCLUSION

The FMLA is not a model of draftsmanship. It does provide a comprehensive but incomplete solution to the knotty problem of how best to balance family needs with the demands of the workplace. It could be an even stronger source of employment-related legislation for the benefit of workers and their families if the permitted leave were converted to paid leave, although such a modification of the statute could arguably impose unacceptable costs upon already overburdened, overtaxed employers. It could also force those employers who act like modern-day Scrooges to clean up their act and be more reasonable and flexible with leave practices, if the remedies for FMLA violations, especially that are reckless and intentional, were modified to allow for recovery of punitive damages, prejudgment interest, and/or statutory penalties in a substantial amount.

Finally, the FMLA could be strengthened considerably if the provisions were amended to place the judicial process for resolving alleged FMLA violations on a faster track.

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<sup>47</sup> 2006 U.S. Dist. LEXIS 4349 (D. Mass. February 6, 2006).

<sup>48</sup> Id. at \*3 (internal citations omitted).

The above discussion is by no means a complete analysis of the hundreds of reported decisions that have construed the FMLA since it was enacted in 1993, but I trust that this summary has provided you with a good overview of current problems and recurring issues that have arisen in the district courts and appellate courts in recent years.

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