

NAVIGATING THE LAND MINES OF THE FAMILY AND MEDICAL LEAVE ACT

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ABSTRACT

The Family and Medical Leave Act (FMLA) was passed with good intentions by both those who opposed and those who supported the act. But in recent years, supporters and critics alike have been critical of the act's ability to achieve its original objectives. This article identifies a number of areas of the FMLA that have presented problems to employers, employees, and policy-makers and then introduces a new issue that has recently arisen in the courts; namely, whether the "hours of service" eligibility requirement for employees requires hours actually engaged in physical work. Recommendations for addressing these controversies are also provided.

When the Family and Medical Leave Act of 1993 (FMLA) was signed into law, the ceremony that accompanied the White House Rose Garden signing was one of much fanfare. Part of the reason for this was that the FMLA was the first major bill signed by newly sworn-in President Clinton. However, the signing also represented a major victory for advocates of the law, which had a long and bumpy ride to the Oval Office. The FMLA, as signed into law, was the result of eight years of Congressional debate, thirteen separate previous votes, and two earlier vetoes by President George H. W. Bush [1].

While the passage of the FMLA was a long and arduous process, Congress felt a need to protect and ensure the stability of American families, given the dramatic changes in the composition of the workforce. In doing so, it recognized that 1) the number of single-parent household was increasing, 2) the number of two-parent households in which both parents worked full-time was increasing, 3) early childhood development was aided by greater participation of parents in child

rearing, and 4) the lack of employment policies that accommodated working parents often forced individuals to choose between their own job security and their parental responsibilities [1]. A major impetus came from a variety of women's groups that began pressuring Congress for some kind of family leave, in light of the fact that most other industrialized countries had paid-leave programs to protect employees [2]. Congress eventually became sufficiently convinced that employees who were temporarily unable to work due to serious medical conditions had insufficient job security [3].

BASIC PROVISIONS OF THE ACT

The purpose of the FMLA is to

balance the demands of the workplace with the needs of families and to entitle 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 health condition [1, 2601(b)(1) and (b)(2)].

The FMLA covers private employers with fifty or more employees working within a seventy-five mile radius of each other, as well as all federal, state, and local government agencies. Employers are required to provide eligible employees up to twelve weeks of unpaid, job-protected leave over a twelve-month period, which commences when the employee first begins FMLA leave. To be eligible for FMLA leave, an employee is required to have worked for the employer for a minimum of twelve months prior to the commencement of any leave and for a minimum of 1,250 hours during that qualifying twelve-month period. Congress stipulated that FMLA leave may be used only for

1. the birth of a son or daughter of the employee and in order to care for such son or daughter;
2. the placement of a son or daughter with the employee for adoption or foster care;
3. 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;
4. a serious health condition that makes the employee unable to perform the function of the position of such employee [1, §2612(a)(1)(A)-(D)].

The FMLA prohibits employers from discriminating against or in any way harassing an employee who chooses to take advantage of FMLA leave. An employee who takes leave under the act must be reinstated to the position occupied prior to the leave and not subjected to any kind of demotion, reduction in pay, or termination based on the use of FMLA leave. Employees who are able to anticipate the need to take FMLA leave should provide employers with thirty days notice prior to the beginning of their leave. If the employee is unable to provide such notice, she or he must give the employer "as much notice as is practicable" [1, §2613(e)(1)].

TROUBLE IN PARADISE

The FMLA appears to have had a wide reach in providing employees with the kind of family and medical leave intended by Congress. To date, more than 35 million employees have taken FMLA leave, with a surprising 40 percent of these individuals being men [4]. Despite the fact that the FMLA has been successful in providing such leave, the implementation of the act has been fraught with problems. Many of the terms of the law, as will be discussed herein, are ambiguous. In fact, one employment law scholar has called the FMLA one of the most misunderstood federal employment laws [3]. Even once the FMLA was passed, many employees remained unaware of the law and the fact that they were protected under it, as many employers did little to educate employees other than a basic required posting about the FMLA [2].

One significant criticism of the act involves the fact that employees who work for smaller businesses receive no leave and that leave is unavailable for new hires or part-time employees, who may need it most. Also, because the leave is unpaid, many individuals who may be eligible for leave are unable to take advantage of it because such leave would render them without income [5].¹ A Department of Labor study found that 63.9 percent of employees eligible for FMLA leave could not financially afford to take such leave due to the fact that it was unpaid [6]. It has been further noted that the terms and coverage of the act lag far behind those of most other industrialized nations, as the United States is one of the only developed countries in the world without any federally mandated paid family leave law [7]. As an example, some form of paid parental/family leave is provided in Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom, as well as in Korea, India, Pakistan, Sri Lanka, Bangladesh, Israel, China, Iraq, Afghanistan, Samoa, and Thailand.

A second problem with the FMLA is that employees who can afford to take unpaid leave often find themselves facing a different dilemma in considering whether to apply for and take FMLA leave. FMLA-eligible employees often fear that they will return to careers and employers that are impaired by a company culture that looks negatively on attention to family issues at the expense of one's job and career continuity [5]. Hence, while employees may be eligible and able to financially afford to take needed FMLA leave, the nonfinancial costs associated with the leave may prevent them from exercising their rights.

Third, employers covered under the FMLA lack strong incentives to comply with the letter of the law. In passing the act, Congress provided very limited

¹It should be noted that while the FMLA permits the use of accrued sick and/or vacation leave as part of the twelve weeks annual leave (hence allowing the leave to be paid), such a decision to use this accrued leave is left to the discretion of the employer or by specific request of the employee. The FMLA also prohibits employees from "stacking" FMLA leave by first exhausting all accrued paid leave and then commencing the twelve weeks of unpaid leave provided by the FMLA.

penalties for violating employers, as neither punitive damages nor damages for emotional distress are available under the FMLA. While the FMLA does provide for injunctive and declaratory relief, the lack of an effective process for timely resolution of FMLA claims can result in a protracted judicial proceeding, with relief finally being obtained long after the leave had been needed by the employee. This was evident in the case of *Knussman v. Maryland*, where partial relief was not finally made available to an employee to care for a newborn child and seriously ill wife until the child was of school age and the wife fully recovered. The resulting stress had left the employee suicidal [8]. Given these facts, it is hardly surprising to learn that since the law's inception, the Department of Labor has logged and investigated more than 16,000 complaints against employers and found 60 percent of these claims to be valid [9].

Fourth, the technical aspects of the law are complex and can be confusing to employers and employees alike. Most employers do not have the specialized medical or legal expertise to deal with these complexities of the FMLA. A 2003 Society for Human Resource Management study found that more than 50 percent of HR professionals have granted FMLA leave that they felt probably wasn't legitimate [10]. Every 18 months, 17 percent of employees need to take some kind of family or medical leave, usually for reasons other than the employee's own health [2]. Many employers automatically grant leave requests, even if they might be suspicious, due to the desire to avoid potential litigation. The average cost to defend an FMLA lawsuit, regardless of the final outcome, is nearly \$80,000 [2]. These challenges have caused many employers to outsource their FMLA compliance responsibilities to outside vendors that will investigate claims and verify eligibility for FMLA leave. As many as 70 percent of FMLA claims are also disability claims, so given that many employers have already chosen to outsource their disability programs, economies of scale can be achieved by similarly outsourcing FMLA responsibilities [9].

Fifth, the FMLA is not only a complex law to administer relative to its own regulations but regulations and requirements contained in the FMLA must work in tandem with various state laws relative to family leave. State laws often provide more generous leave provisions than those found in the FMLA, which can create confusion for employers relative to compliance. Key areas in which state law may be more generous than the FMLA include 1) fewer hours of work to qualify for leave, 2) fewer employees for an employer to be covered under the law, and 3) an expanded definition of "family," which might include domestic partners and/or in-laws [4]. As an example, as of July 2004, California employers are required to provide employees with six weeks paid leave to care for a newly born or adopted child or a seriously ill child, spouse, parent, or domestic partner. The program is funded by a payroll tax on employees as part of the state disability insurance program, and employees receive 55 percent of their wages up to an annually adjusted maximum amount. In addition to California, twenty-six other states currently have their own family and medical leave laws and programs, the content

and scope of which are not in tandem or consistent with each other. As a result, multistate employers have to determine which state or federal leave policy will provide employees in various locations with the greatest protection and administer the law accordingly, taking into consideration different parameters, requirements, and specification of the laws.

Sixth, the leave provisions themselves have been problematic for many employers due to increased and exacerbated absenteeism under the FMLA. Employees with poor attendance records have found that the FMLA can protect them from discipline or other administrative action, because the FMLA prohibits employers from taking disciplinary action against employees for absences that are due to FMLA-related leave [11]. Since most employers do not have the time or resources to verify each individual instance of leave, employers risk an FMLA violation if they challenge a request for leave without a full investigation [11]. Most of the time when an employee takes FMLA leave, his/her work is reassigned temporarily to co-workers [12]. One undocumented effect of the FMLA is resentment on the part of co-workers toward those who are excessively absent and the accompanying effects on morale and team dynamics [12].

Seventh, the FMLA provides for “intermittent leave.” Intermittent leave provision of the FMLA provide that leave need not be taken all at one time. Employees may take time in increments as small as the lowest increment used by the employer’s payroll system. In most instances, this usually is a single hour. Twenty-eight percent of all FMLA leave is intermittent [4]. This intermittent leave provision makes the law potentially ripe for abuse. Some employers refer to the acronym of the act as meaning “Far More Leave than anyone intended Act,” and human resource managers report that such intermittent leave often results in chronic staffing difficulties and impaired operations [10].

Finally, the costs of compliance with the FMLA can be significant. The Employment Policy Foundation notes that just the reporting and record-keeping associated with the act costs businesses more than \$200 million per year [10]. In addition, employee absences associated with FMLA leave can have significant costs for employers. By one estimate, an employer with 1,000 employees can save \$720,000 annually by simply reducing its absentee rate by a single percentage point [2].

A NEW PROBLEM

The issues discussed above present ongoing challenges to employers who are covered under the FMLA. However another problem recently has arisen concerning employees who have been unjustly terminated from their employment and subsequently sought FMLA leave. The FMLA is conspicuously silent on the issue of whether reinstatement remedies involve credit toward FMLA eligibility for the time in which the employee had been unjustly terminated. Specifically, are the hours in which the employee would have worked had s/he not been terminated

counted toward the 1,250-hour requirement in determining FMLA leave eligibility? At this juncture, only two federal courts have addressed this issue, but they have reached opposite conclusions. Since the circuit courts are split relative to this issue, there is a dire need for some consistent interpretation of the FMLA in light of the objectives Congress sought to achieve when it passed the FMLA.

One Interpretation: Hours of Service Include Only Hours Physically Worked

The First Circuit, in *Plumley v. Southern Container* [13], was the first to deal with the issue of whether the “hours of service” eligibility requirement mandated that employees physically have worked 1,250 hours during the preceding twelve months. This case dealt with the question of whether back-pay compensation awarded for work hours lost during an employee’s successful grievance of a termination should be counted toward the “hours of service” requirement of the FMLA. The facts of the case are:

John Plumley began work at the Westbrook, Maine, plant of Southern Container, Inc. (SCI) in February of 1996. Plumley was a member of a bargaining unit represented by Local 669 of the United Paperworkers International Union. SCI and the union were parties to a collective bargaining agreement that included a grievance procedure under which a grievance committee elected by the union would negotiate all employee grievances with SCI. Complaining employees were bound under this procedure; however if the dispute could not be resolved amicably between the committee and the SCI, either side could elect to take the matter to binding arbitration [13].

During his tenure at SCI, Plumley invoked the grievance procedure on seven different occasions. One of these followed his March 21, 1998, discharge. The dispute over the discharge eventually reached arbitration, and the arbitrator found the sanction overly harsh, vacated the dismissal in favor of a two-week suspension without pay, and ordered SCI to compensate Plumley in full for lost wages and benefits that would have been earned during the time in which his grievance was being processed (adjusted for the two-week suspension). This process took approximately six months, and Plumley was compensated accordingly and reinstated to his job on October 12, 1998 [13].

Upon returning to work on October 12, Plumley departed prior to completing his shift. The next day he left a message stating that he would be late or absent because he needed to see his father, who was ill. When Plumley returned to work on October 14, he was reprimanded and fired. He again filed a grievance, which the union chose not to submit to arbitration. Plumley then filed suit against SCI, alleging a violation of the Family and Medical Leave Act [13].

Plumley argued that he was eligible for FMLA leave as he had been employed with SCI for more than one year and had further met the 1,250 hours of service requirement. In making the latter determination, Plumley added the 851.25 hours

he had actually worked prior to his March 21st discharge to the hours for which he was compensated under the arbitration award, subtracting the hours for the two-week suspension imposed by the arbitrator. Plumley argued that, as a matter of law, these hours that were compensated under the arbitration award constituted “hours of service” under the FMLA. SCI refuted Plumley’s claim that he was eligible for FMLA leave, emphasizing that Plumley had worked far fewer than the 1,250 hours mandated by the statute [13].

The First circuit found the case to be relatively straightforward, since there was no dispute among the parties regarding any matters of fact, but rather, simply the interpretation of the “hours of service” requirement of the FMLA. In attempting to determine whether the compensated hours awarded by the arbitrator should count as “hours of service,” the court examined the specific language of the FMLA. The FMLA states “for purposes of determining whether an employee meets the hours of service requirement . . . the legal standards established under section 207 (of the Fair Labor Standards Act) shall apply” [1, §26112 (2)(C)]. The court found the applicable subsection of the Fair Labor Standards Act (FLSA) [14] that deals with pay classifications states that the ‘regular rate’ at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee” [14].

The court then defined “employment” as “work for which one has been hired and is being paid by an employer.” Similarly, “work” was defined as a verb as “to exert effort, to perform, either physically or mentally.”² In considering the definition of work as requiring exerted effort, the court reasoned that only those hours an employer permits an employee to do work for which the employee has been hired and is being paid can count toward the hours of service requirement of the FMLA.

The court also noted a list of remunerations listed in section 207 of the FLSA that were explicitly exempt from the “regular rate.” This list includes “rewards for service, the amount of which are not measured by or dependent on hours worked, production or efficiency and payments made for occasional periods when no work is being performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause” [14, §207 (e)(1)-(2)]. Using this premise, the court reasoned that compensation paid for hours not actually worked in service for the gain of the employer cannot be counted toward hours of service. However, the court did note that it could not find a basis in the statute to make a principled distinction between wages received for hours not worked because the employer could not provide sufficient work and wages received for hours not worked because the employer unjustly kept the employee from working (and hence, still failed to provide “sufficient work”).

²Definitions from Black’s Law Dictionary, 7th ed. (1999), pp. 545, 1599.

Plumley countered with the argument that there was a principled distinction in that the listed items in section 207 provide some benefit to the employee, whereas a wrongfully discharged employee receives no benefit and is, in fact, treated detrimentally. The court found this argument unpersuasive due to the fact that the outcome was the same; the employee received compensation for time not physically worked [13].

The court further considered the issue of benefit to the employer. It noted that the Supreme Court had previously defined work, under the Fair Labor Standards Act, as “physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer.”³ Consistent with this finding, the Plumley court noted that there was a history of courts being faced with interpretations of whether particular hours are covered under section 207 of the FLSA to consider whether the employer received some benefit.⁴ Given the history, the court reasoned that counted “hours of service” needed to be accompanied by some tangible gain or benefit to the employer who is paying the employee for such hours [13].

ANOTHER INTERPRETATION: HOURS OF SERVICE INCLUDE ALL COMPENSATED TIME

More recently the Sixth Circuit, in *Ricco v. Potter* [15], was faced with the exact issue that faced the First circuit in *Plumley*: specifically whether the FMLA “hours of service” eligibility requirement should include hours compensated as part of a “make whole” relief awarded to an unlawfully terminated employee. In this case, Doreen Ricco began work at the United States Postal Service general mail facility in Cleveland in July, 1993. When the postal service terminated her employment in December, 1997, Ricco filed a grievance and had her termination converted by an arbitrator to a thirty-day suspension on February 8, 1999. Her reinstatement was contingent on passing a “fitness-for-duty” examination. Subsequent to the examination, Ricco returned to work with “full credit for years of service for seniority and pension purposes” [15, at 601].

Shortly after her return to work, Ricco’s husband passed away and she began suffering from depression and migraine headaches, which required intermittent

³This definition had been set forth in *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 23*, 321 U.S. 590, 598, 88 L. Ed. 949, 64 S. Ct. 698 (1944).

⁴This argument was based on the following cases: *Richardson v. Costco Wholesale Corp.*, 169 F. Suppl. 2d 56, 61 (D. Conn. 2001) (holding that employee’s time spent in “lock-in collection procedure” does not constitute work under the FLSA because not integral to employer’s business activities); *Ragnone v. Belo Corp.*, 131 F. Supp. 2d 1189, 1194-95 (D. Or. 2001) (determining the pilot’s on-call time was not spent primarily for the benefit of the employer and its business and thus did not constitute actual hours worked under the FLSA); *Dinges v. Sacred Heart St. Mary’s Hosp., Inc.*, 164 F.3d 1056, 1059 (7th Cir., 1999) (reasoning that emergency medical technician’s on-call time is not work under the FLSA).

leaves of absence from May through July, 1999. When Ricco requested FMLA leave in early May, 1999, she was denied because the postal service concluded that she had not met the “hours of service” requirement of the FMLA. Ricco argued that she was unable to work 1,250 hours during the preceding year solely due to the fact that she had been unlawfully terminated in violation of her unit’s collective bargaining agreement. On October 15, 1999 Ricco was terminated “due to a failure to maintain a regular work schedule.” Ricco again grieved her dismissal. However, on November 19, 2001, the arbitrator affirmed her dismissal due to her excessive absences, further stating that “this is not the proper forum to litigate any alleged violations of the FMLA,” in refusing to consider whether the postal service had actually violated her FMLA rights [15, at 601].

Ricco subsequently filed suit and the district court, citing *Plumley* as precedent, ruled against her. On appeal, Ricco argued that the district court erred in relying on *Plumley* and instead needed to balance the competing interests of employers and employees to prevent employers from unlawfully terminating employees as a means of depriving them of their FMLA rights [15].

Ricco’s appeal was based on the fact that while the First Circuit had correctly looked to the Fair Labor Standards Act for guidance regarding the proper interpretation of the “hours of service” requirement of the FMLA, neither the FMLA nor the FLSA had specifically defined “hours of service.” Moreover, Ricco argued that the language of the FLSA does not support the interpretation of the “hours of service” requirement adopted in *Plumley*, since the FLSA simply defines “regular rate” of payment. Given such an absence of a definition of “hours of service,” Ricco asked the Sixth Circuit to consider the FMLA’s express purpose of “balancing the demands of the workplace with the needs of the family” and, in doing so, to “discourage employers from unlawfully terminating employees to prevent them from meeting the hours-of-service requirement.

To counter this argument, the postal service asked the court to consider the legislative history of the FMLA, the pertinent previously-cited provisions of the FMLA, the *Plumley* precedent, and the Supreme Court interpretation, all of which supported the FLSA “hours of service requirement to exclude time for which an employee was paid but did not work.” The postal service further argued that interpreting “hours of service” to include hours that were compensated as part of a “make whole” award would undermine the FMLA’s purpose of allowing “employees to take *reasonable* leave . . . in a manner that accommodates the legitimate interests of the employer” [15, at 603].

The postal service also relied on a specific provision of Section 207 that the First Circuit was not asked to consider in *Plumley*. This provision excludes from an employee’s “regular rate” of compensation “payments to an employee which are not made as compensation for his hours of employment” [§207, 207(e)]. While the FLSA is silent as to whether compensation paid for time not worked as part of a “make whole” award is to be included under “hours of service,” the postal service

felt that this clause from section 207 made clear Congress's intent that "hours of service" be restricted to hours actually worked.

Given that the First Circuit had not actually considered what constituted "hours of service" under the FLSA (and hence the FMLA) and that neither statute had defined "hours of service," the Sixth Circuit closely examined the exclusions clause of Section 207 of the FLSA. The court found that "the time that an employee does not work due to vacation or illness is conceptually dissimilar from time that an employee does not work due to unlawful termination" [15, at 605]. Hence, the court reasoned that hours not worked due to an unlawful termination are, hence, not within the exclusions provision of Section 207 relative to making a determination of "hours of service." Specifically, the court ruled that

Such hours are different from occasional hours of absence due to vacation, holiday, illness and the employer's failure to provide work, etc. in that they are hours that the employee wanted to work but was *unlawfully* prevented by the employer from working. Section 207 does not clearly prevent such hours from counting, and the purpose of the FMLA's hours-of-service requirement is properly served by including these hours. In such cases, the employer's unlawful conduct has prevented the employee from satisfying the hours-of-service requirement. Moreover, denying employees credit toward the hours-of-service requirement for hours that they would have worked, but for their unlawful termination, rewards employers for their unlawful conduct [15, at 605].

RECOMMENDATIONS

The above discussion makes clear that while enacted in good faith and spirit, the Family and Medical Leave Act is problematic. One scholar has criticized the act for being unable to reach its most basic objectives and greatly in need of overhaul [16]. Since its inception, employers have found the FMLA provisions for certification, administration, tracking, and compliance both confusing and problematic [4]. The United States Chamber of Commerce opposed the bill in 1993 and still lobbies against its provisions, particularly in response to its ambiguous definitions of "serious medical condition," as well as against the provision that allows employees to take leave in small increments of time [10]. The Society for Human Resource Management has identified the FMLA as one of the most important law-related issues of 2005 of which employers should be aware, and the Office of Management and Budget has directed the Department of Labor to review a number of FMLA regulations with the goal of reducing burdens imposed on employers [17].

Policymakers and employers should consider several recommendations to address some of the problems associated with the FMLA. Relative to the unavailability of leave for a fairly significant portion of the workforce (i.e., employees of smaller companies, part-time employees, and new employees) both policymakers

and organizations should determine who actually most *needs* FMLA-related leave. Policymakers should consider this when revisiting and/or amending the law. Employers should consider this when setting their own employment policy. It is critical to remember that federal and state laws set minimum requirements that employers must meet. Employers are certainly free to go beyond that which is legally mandated in ensuring that they remain “employers of choice” as well as take full advantage of the available pool of talent in the labor market.

Relative to the fact that the FMLA mandates only unpaid leave, employers again have the option of providing more generous benefits. This can be done without incurring additional costs if employers allow employees to donate “bankable” sick leave to a pool from which other employees can draw. To prevent abuse, a joint employee/employer committee could meet to consider and approve or disallow requests for donated leave.

Relative to the reluctance to take leave due to career-related concerns, employers are advised to create, maintain, and nurture a “family-friendly” culture. Senior managers must show their commitment to and support of this. Given the nature of societal demographics, this would help ensure the widest availability of talent as well as allow employers to promote themselves as being supportive of employees’ work/life balance needs.

Relative to the lack of incentives for employers to comply with the FMLA, policymakers need to examine the existing mechanisms that address FMLA violations. Harsher penalties for noncompliance might assist in ensuring that employers implement the law fairly, but more important is a means for timely adjudication and resolution of disputes related to FMLA leave. As discussed within, the statute is complex and ambiguous, and many employers may simply be confused about whether an employee is eligible for leave and not necessarily be attempting to undermine employee rights.

Similarly, the complexity of the language of the law, particularly relative to what constitutes a “serious medical condition,” confuses the intent of Congress and leaves both employers and employees, as well as their respective advocates, uncertain as to whether a particular condition merits FMLA protection. While there is, of course, a need to consider specific instances on a case-by-case basis, more specific guidelines could remove much of the uncertainty surrounding leave eligibility. Any potential revisions of the FMLA should further consider relevant state laws that address family and medical leave relative to their scope and coverage in an attempt to provide greater clarity to both employees and employers as well as attempt to provide some consistency, to whatever extent possible, among the various laws.

Relative to intermittent leave, policymakers need to reexamine the nature of intermittent leave with regard to fairness and equity. Current intermittent leave policies cause problems for employers and co-workers of employees who may be able to abuse leave under the current intermittent leave standards.

Tightening up the availability of intermittent leave can benefit everyone except abusing employees.

Finally, this article examined the newest FMLA controversy surrounding leave eligibility for those who have unjustly been subjected to adverse employment actions. Both the FMLA and FLSA are silent on this issue, which has resulted in tremendous ambiguity in the courts' interpretation of the 1,250-hour-eligibility requirement. This issue needs to be addressed by policymakers as soon as possible.

The spirit of restitution and "making whole" involves providing the employee with everything s/he would have received had the employer not acted illegally. If the employee were not able to 'count' hours for which s/he was compensated under a make-whole decision toward the 1,250 hour requirement for FMLA eligibility, employers would be able to directly undermine the basic objective of the FMLA; attempting to balance the needs and demands of employers with those of families. Employers would have an incentive to engage in the kind of behavior seen in *Plumley* and *Ricco*, since in both of these cases the only thing that prevented the employees from qualifying for FMLA leave was their employer's illegal action in terminating them.

CONCLUSION

The Family and Medical Leave Act addresses a complex social and personal issue: the need to balance caring for oneself and one's family with the need to make a living. It asks employers to make some compromise and accommodation to ensure that this can happen, often resulting in direct financial costs and/or inefficiencies in operations. The original law, as problematic as it is, is a meritorious first step in trying to address the complexities surrounding employees' needs to care for themselves and their families while maintaining their employment. We now have more than a decade of experience with the act with which to consider necessary reforms to ensure that both the needs and demands of employers and the needs of families can be met simultaneously. While there are, of course, trade-offs, the net is certainly not a zero-sum game. Employees' and society's best interests are served by allowing employees *reasonable* leave. Reasonable leave also serves employers' interests, but the key is to successfully identify the point at which the benefits to employers outweigh the costs they must incur. The time for action is now. Policymakers should attempt to make the law better, and employers should consider the optimal balance of family-friendly policies that they can and should employ to ensure both effectiveness and efficiency in operations.

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