

**FAMILY MEDICAL LEAVE ACT:  
MAJOR PROVISIONS AND COURT INTERPRETATIONS**

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**ABSTRACT**

The Family Medical Leave Act of 1993, which grants up to 12 weeks of unpaid leave to a serious illness of a close family member, the employee's own illness, or for childbirth or adoption, is under review by Congress and the administration. This legislation has been both praised and decried. The article comprehensively examines the law, regulations, and case law. Guiding principles for compliance are provided, and recommendations for simplifying the act and its regulations are offered.

The Family Medical Leave Act (FMLA), which provides unpaid leave for seriously ill family members and child adoption, took effect in 1993. In passing this legislation, Congress found that the number of single-parent and two-parent households in which the single parent or both parents were working was significantly increasing. In Congress's judgment, it was important to child development and a healthy family unit that parents be able to participate in early child-bearing as well as to care for seriously ill family members [1]. Consequently, the FMLA was passed "to balance the demands of the workplace with the needs of

families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity” [1, § 2611]. An additional purpose was “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, § 2611].

The FMLA covers about 60 percent of the workforce, and by many accounts has been a godsend to millions of workers [2]. The Department of Labor (DOL) estimates that more than six million workers have taken FMLA leave since 1993 [3]. Surveys reveal that more than 14 percent of eligible workers use FMLA. Fifty-eight percent of the users are women, and 80 percent of the time leave is taken by workers experiencing an illness or caring for an ill family member [4]. Due to the act’s perceived success, employee groups have called for expanded coverage of FMLA to include covering more workers and to even pay for leave [5].

However, employers have often found complying with the FMLA to be an administrative nightmare [4]. Organizations are required to document small increments of leave (less than eight hours), which can be difficult to track [4]. Much confusion also exists over what constitutes a serious health condition [4] as well as concerns over the perceived ease with which leave provisions can be abused [3]. As a result, industry groups have been pressuring the administration and Congress to revise the law and its regulations to rein in its requirements [3, 5]. At this writing, revisions to the FMLA are still being considered, and whether coverages will be expanded or restricted is a matter of conjecture.

Given the current focus and debate over the FMLA, it would be helpful to review the major provisions of the act and its attendant case law to understand the extent of the act’s coverages and complexities. While there have been a variety of publications on various aspects of the FMLA and the case law, comparatively few articles have comprehensively reviewed the FMLA. To that end, a Lexis-Nexis keyword search yielded more than 130 court cases, mostly at the appeals court level.

## COVERED EMPLOYERS

Organizations must employ fifty or more workers who are on the payroll for twenty or more calendar weeks in either the current or preceding calendar year and within 75 miles of a worksite; otherwise, they are not covered [1, 6]. The courts have upheld this clause even though a firm might have more than the fifty necessary employees but not within the requisite 75-mile radius [7, 8]. The worksite is construed as the employee’s regular place of work and not the office that hired him/her [9]. But for employees with no fixed site of employment (e.g., railroad workers, bus drivers, salespersons), DOL regulations set their home base as the one from which their work is assigned, or to which they report [9]. The 75-mile distance is measured by surface miles, using surface transportation

over public streets, roads, etc., by the shortest route from the facility where the eligible employee needing leave is employed [6].

Only workers within the states, territories, and possessions of the United States are eligible. Also included in the fifty employee count are any employees on paid or unpaid leave, disciplinary suspensions, leave of absence, etc., as long as there is a reasonable expectation the employee will return to active employment [6].

The number of employees for many employers fluctuates above and below the 50-employee minimum throughout a given year. As long as the employer has fifty employees within a 75-mile radius at the time of the request, the person is covered until the end of the leave (even leave taken intermittently but on a regular basis for chronic conditions), despite any drops below the 50-worker threshold [6].

### **Joint Employers**

When a person performs work for more than one employer, those employers may be considered “joint employers,” if certain legal criteria are met. Employment must take place on the premises of the alleged employer; it must have a high degree of control; and it should have the power to hire, fire, or modify the employment conditions of the employees [6,7].

For example, in *Morrison v. Magic Carpet*, a pilot was terminated for demanding FMLA leave to deal with his clinical depression [10]. However, Magic Carpet did not have fifty employees within a 75-mile radius. Consequently, he argued that RDV Sports, a major contractor for whom he transported professional basketball players, was also his employer under the act (it had more than fifty employees). However, the record revealed that while he did have to wear a RDV identification badge and received a bonus from them, they did not have any direct control over his employment [10]. In another case involving an airline and a service company, an appeals court ruled that providing a detailed checklist of what was to be cleaned and how baggage was to be loaded is not legally considered direct control [11].

In cases involving public sector entities, the determining factor is again control over the employee(s) [12]. In *Fain v. Wayne County*, an employee working for the auditor’s office was terminated for taking leave; however, the auditor’s office employed only twelve persons [12]. The plaintiff argued that the auditor’s office was a part of the broader county administration, which would include more than fifty employees. This office was located in the county office building along with other departments of the county government. Although it was a separate entity, the court found that the auditor’s office was an integral part of the county administration. In addition, the employee’s paycheck was issued by the county, and its employee benefits were handled by the county. As a result, the court ruled for the plaintiff [12].

## State Immunity

Until 2003, most appeals courts had ruled that in order to be covered by FMLA, states had to provide their consent; otherwise, the act was unenforceable under the Eleventh Amendment's state immunity clause [13-15]. However, in 2003, the Supreme Court disagreed, stating in part that, "Congress may abrogate the States' Eleventh Amendment immunity from suit in federal court if it makes its intention to abrogate unmistakably clear in the language of the statute and the acts pursuant to a valid exercise of its power under the Fourteenth Amendment" [16, at 728]. The Court determined that this condition had been met with respect to FMLA.

## ELIGIBLE EMPLOYEES

Workers must be employed for at least twelve months by an organization and have completed 1,250 hours of service in the previous twelve-month period in order to be eligible for FMLA [1]. The courts have consistently upheld dismissal of cases of employees who fail to meet these stipulations [17-19].

The twelve-month service requirement is determined from the date the leave commences [20]. However, the employee does not have to be at work to meet this condition. In *Babcock v. BellSouth*, a woman requested FMLA leave but did not have the necessary service; nevertheless, she was granted short-term disability leave under the company's benefit policy [20]. When this leave was exhausted she made another request for FMLA leave. It was denied, and she was terminated for unexcused absences even though her anniversary date had passed, making her eligible for FMLA. BellSouth argued that she must first return from leave in order to be eligible. The appeals court disagreed and upheld the jury verdict in favor of the plaintiff [20].

The act is silent as to the calculation of the 1250-hour requirement; however, the DOL and the courts have followed the Fair Labor Standards Act (FLSA) in making this determination [19, 21]. In general, the 1250-hour service requirement includes only time actually worked and not vacation, holidays, disciplinary suspensions, etc. [19, 22]. Consistent with these principles, one appeals court has ruled that an arbitration compensation award cannot be tallied as time worked [19].

Nevertheless, the Sixth Circuit of Appeals does allow such awards to be counted toward the hourly minimum as long as certain conditions are met [21]. In *Ricco v. John V. Potter*, a terminated worker was reinstated after arbitration with only a thirty-day suspension and was granted back pay for the remaining time that she was unemployed [21]. After her reinstatement, she became ill and needed to take leave but did not meet the 1250-hour threshold and was denied FMLA leave [21]. In the lawsuit that followed, the court ruled for the plaintiff by counting the time during which she had been suspended. The court noted that back

pay from an arbitrator's award is "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 the employee wanted to work but was *unlawfully prevented* by the employer from working" [21, at 605]. The court further pointed out that past arbitration awards have been counted toward overtime work that would have been performed but for an employer's violation of employment laws [21].

Consistent with FLSA, calculation of the 1250-hour requirement may also include time not recorded on time sheets [23]. In *Kosakow v. New Rochelle Radiology*, a cancer patient was terminated while on leave [23]. She was told that she had worked only 1,186.5 hours and hence was not covered by FMLA [23]. However, in vacating and remanding the district court's summary judgment for the defendant, the appeals court felt there was sufficient evidence that she had spent time in continuing education courses needed for her job and that she had arrived 15 minutes early every day. If it could be shown on remand that these activities were necessary to do the job and that the company should have included them in her work hours, she would have been over the FMLA threshold [23].

The Second Circuit further pointed out that the company had never informed Kosakow that she did not have the necessary hours. If it had, she could have delayed her surgery so that she could have obtained the necessary hours. "Accordingly, an employer who remains silent when its employee announces that she plans to take medical leave is effectively misleading that employee into believing that she is protected by the FMLA" [23, at 717].

### **Key Employees**

DOL regulations allow organizations to deny job restoration to FMLA-eligible employees who are among the top 10 percent of the highest-paid employees within 75 miles of the employee's worksite [6]. To deny restoration to a key employee, management must determine that reinstatement would cause "substantial and grievous injury" to the organization's operation [6]. Assuming the key person has been replaced, this usually involves the cost/harm to the employer of reinstating the employee in an equivalent position [6]. Such individuals must be told at the time of the request for leave that they qualify as key employees, and the employer must fully inform them of the potential reinstatement and benefit consequences.

As soon as the employer determines that substantial and grievous economic injury will result, it must notify the employee that while it cannot deny leave, it does intend to deny restoration to employment upon completion of FMLA leave [6]. The employer must allow the employee the opportunity to return to work once it sends the nonrestoration notice to the worker (assuming s/he is on leave at the time of this notice). Should the employee not return immediately from leave, s/he is still entitled to reinstatement at the end of the leave unless another evaluation can determine that substantial and grievous economic injury would result from such action [6].

### **Implied Contracts**

In situations where employees do not meet the eligibility requirements for FMLA, organizations must be careful not to create an implied contract providing the employees coverage, unless it is their intent to do. In *Thomas v. Pearle Vision*, the company did not have fifty employees within a 75-mile radius, but nevertheless provided FMLA leave as long as its employees met the remaining eligibility conditions [24]. One of its doctors noted that she was among the highly compensated and could be denied job restoration returning from pregnancy leave. However, she was told that her job was safe and that the company would find ways to cover her work until she returned. She offered to cover the essential parts of her job but was told not to worry, that her position would be covered until she returned [24].

While she was on leave, the company hired several part-time doctors but there were still problems with job coverage. As a result, Pearle Vision hired one doctor full-time and denied job restoration to the female doctor when she attempted to return from leave. Since the company did not clearly inform the doctor of its intentions to replace her and since she relied on the communications to her detriment, the appeals court reversed a summary judgment for the defendant [24].

### **Qualifying Condition**

To be covered, a worker must experience a qualifying condition. A qualifying condition is defined as the need for continuing care, the inability to perform one's job, or the need to care for an ill family member [6]. When this condition is met, the employer must offer the worker up to twelve weeks of unpaid leave in any 12-month period for the following conditions: a) after childbirth, b) adoption, or foster care, c) to care for a seriously ill child, spouse, or parent, or d) in case of an employee's own serious illness [6]. Leave may be taken in any increment [6].

However, for husbands and wives employed by the same organization, leave is limited to a combined total of twelve weeks in any twelve-month period for: a) birth of a child or its care after birth, b) placement of a child with employee for adoption or foster care, or its care after placement, and 3) to care for the employee's parent with a serious health condition [6].

### **Waivers**

DOL regulations state that "employees cannot waive, nor may employers induce employees to waive, their rights under FMLA" [6, § 825.220d]. However, DOL regulations do allow employees to waive their FMLA rights with the prior approval of the DOL or a court [6, § 825.220d]. The courts have generally upheld these regulations [25]. Nevertheless, at least one appeals court takes the position that anyone who signs a waiver and accepts consideration cannot sue unless s/he returns the consideration before filing a charge [26].

### **Statute of Limitations**

Victims filing claims under FMLA must do so within two years, unless the violation was willful, then a three-year period applies [27].

### **NOTICE TO EMPLOYEES**

The FMLA requires that each employer post and keep displayed in conspicuous places on its premises posters (preferably government-issued) outlining the pertinent provisions, coverages, medical certification requirements, and protections under FMLA [1]. DOL regulations also dictate similar information be included in any existing employee handbooks [6].

### **Lack of Written Policies**

Absent “employer written policies, manuals or handbooks describing employee benefits and leave provisions, the employer is required to provide written guidance to employees concerning all the employee’s rights and obligations under FMLA” [6, § 825.301]. This notice must be provided each time an employee gives proper notice to the employer of a possible need for leave [6].

FMLA regulations also require that employers provide written notice to affected workers explaining the employees’ obligations and penalties for failing to comply with employer FMLA requirements. This notice must include: whether leave is counted against the employee’s FMLA entitlement, any requirement to furnish medical certification of a serious health condition, employee’s rights to substitute paid leave, whether or not the employer requires substitution of paid leave, requirements for the employee to pay any premiums to maintain health benefits, and any demand for the employee to present a fitness-for-duty certification in order to return to work [6]. However, the Eleventh Circuit ruled in 1999 that this notice does not have to be in writing [28].

### **Lack of Notice Can Make No Difference**

When the employer fails to notify employees of their FMLA rights, but this does not affect their employment or the leave for which they qualify, there is no violation [29]. For example, a financial analyst suffering from gender dysphoria took a leave of absence to live as a woman for four to six weeks before undergoing sex-reassignment surgery [30]. She was told that she might qualify for FMLA, but she did not want to comply with the certification requirements nor disclose the nature of her need for leave other than for “personal reasons.” She told her employer that she would resign at the end of the leave. But she later changed her mind and returned to work in another position, for which she was later terminated for poor performance. She then sued on the basis that she was never specifically informed of her FMLA rights. However, the court ruled for the employer, noting

that when she was told that she might qualify, she refused to comply with the medical-certification requirements and that it was clear she did not have a serious illness when her leave commenced [30].

In another case, a worker took leave for a hernia-related injury [31]. He was later terminated while still out on leave. He sued on the basis the company never explicitly told him the exact day he would exhaust his twelve weeks of leave, even though management had informed him that he was entitled to twelve weeks of leave. Since he would have been unable to return from leave due to his illness anyway, the court ruled that more specific information would have made no difference in this situation and affirmed the district court's ruling for the employer [31].

Another firm failed to inform its pregnant controller of her FMLA rights, but still granted her the time off she needed for her pregnancy [32]. Upon return to work, she was told that her job duties would be reduced, in effect demoting her. She resigned and filed a FMLA charge. The Sixth Circuit agreed that the company had failed to notify her of her FMLA rights, but remanded the case to determine whether she had suffered any loss for which she could be compensated. If there was none, she would not be entitled to any compensation [32].

### **When Lack of Notice Can Be a Violation**

In those situations where notice of FMLA rights is not communicated and directly affects a worker's employment, there is a violation, and compensation and penalties may be awarded.

In *Duty v. Norton-Alcoa Proppants*, an employee was given a certified letter notifying him of the date his leave would expire [33]. However, the date was incorrect. His leave actually expired a few weeks earlier. When he attempted to return on the designated date, he was told that he had been terminated. In court the employer argued that it had provided the worker the required twelve weeks of leave and could not be expected to provide additional leave time. The Eighth Circuit disagreed, in that the worker had been notified by the employer that he had protected leave through the date specified in the letter, and the court upheld the jury award of \$300,000 in damages [33].

In *Scamihorn v. General Truck Drivers*, a truck driver had to leave his job to care for his clinically depressed father [34]. When he discussed the matter with his employer, it did not inform him of his FMLA rights but rather talked him into resigning and agreed to rehire him once his father was better. However, the employee later discovered that he had to start over as a probationary employee. In the subsequent lawsuit, the Ninth Circuit ruled that the employer should have informed him of his FMLA rights since there was evidence that his father's depression could have met the FMLA's definition of serious illness [34].



## NOTICE TO EMPLOYER

To be covered, eligible employees must inform the employer of their need for FMLA leave. Notice may also be provided by someone representing the employee such as a spouse, adult family member or other responsible party [6]. “The employee need not expressly assert rights under the FMLA or even mention FMLA, but may only state that leave is needed” (6, § 825.303(b)).

Employees cannot demand leave, but rather must provide a reason for the leave to the employer as soon as it is practical to do so. It has to be enough information that puts the employer on notice that the employee may have a FMLA-qualifying condition [35]. It is then the responsibility of the employer to follow up formally or informally to determine if the condition qualifies under FMLA.

*Aubuchon v. Knauf Fiberglass* illustrates many of these principles [35]. In this case a worker orally notified his employer that he wanted FMLA leave after his wife experienced complications from her pregnancy [35]. But the reason he gave was that he wanted to stay home with her until childbirth. Further communications, including his formal written request, did not mention pregnancy complications. His request was denied, and when he failed to show up for work, he was terminated. After he was terminated, he produced a note from the doctor documenting her pregnancy problems. In denying his claim, the Seventh Circuit explained in part that “he cannot demand leave . . . he just has to give the employer enough information to establish probable cause, as it were, to believe that he is entitled to FMLA leave” [35, at 953]. The court added that producing documentation after the fact is too late [35]. If the worker had provided this information earlier it would sufficed to qualify him for FMLA leave.

Simply telling the employer that one is sick, there is a pain in one’s side, that one must miss work because of family problems, undergoing some medical tests, needs time off to visit a sick grandparent, or just requesting sick leave are not adequate grounds to put the employer on notice of a potential FMLA illness [35-40]. Merely scheduling oneself for a medical appointment and not referencing a medical condition to the employer is also insufficient notice [41]. Similarly, an industrial engineering supervisor walked off the job because of perceived stress and felt his health was at risk. At no time did he furnish Daimler-Chrysler any indication that this could be a serious health condition. As a result, the Eighth Circuit concluded that he had not fulfilled his affirmative duty to indicate both the need and the reason for the leave [42].

Once the employer is aware of a potential FMLA illness, it cannot discourage the employee from taking FMLA leave. This would be a FMLA violation and could result in losing a lawsuit [6, 43]. Also, once an employer is put on notice, it has a duty to investigate and determine whether the problem is an FMLA-qualifying illness [44]. Otherwise, it can be a FMLA violation [44].

### Notice for Chronic Conditions

Chronic conditions are usually covered under FMLA, but proper notice is still mandated. Asking time off to care for a child who had a learning disability is not adequate information to inform the employer of a potential FMLA event [45]. There needed to be much more specific information and condition to meet notice requirements. Likewise, in a situation where a diabetic was dismissed after being denied FMLA leave after informing his supervisor that there was a problem with his insulin pump, there was not enough information to signify a serious health condition (the pump's battery could have needed changing, etc.) [46].

Conversely, a bank employee who had clinical depression experienced an episode of depression and informed her supervisor that it "was depression" again [47]. She was terminated the next day and the bank defended its actions on the basis that this information was insufficient to indicate a qualifying FMLA illness. However, the Eighth Circuit found for the plaintiff because the employer had known for some time that she had clinical depression and was under a doctor's care. Consequently, informing her employer that it was her depression again was factual enough to put the bank on notice that she could be experiencing a FMLA-qualifying event [47].

In another case that involved seizures related to Lyme Disease, a trucker was placed on sick leave after it was discovered during a routine medical certification exam for a Commercial Motor Vehicle license that he was taking antiseizure medication [48]. Management decided that his antiseizure medication rendered him incapable of operating a motor vehicle and terminated him. In the subsequent lawsuit for abridgement of his FMLA rights, the company argued that he never asked for FMLA leave and that he did not have a serious illness. However, the court pointed out that it was the company that placed him on sick leave. By this action the company recognized that he had a potentially serious illness that might qualify for FMLA and since the worker does not have to explicitly request FMLA leave, the court ruled for the plaintiff [48].

The courts have gone so far as to allow workers to request leave in situations where there was no one identifiable serious illness but the workers were seeking treatment for a myriad of problems over a short period of time [49]. In one such situation, a female employee asked for leave after receiving treatment for various health problems eight times in the two-month period preceding her request for leave (her physician wanted her to go on leave for medical reasons), and it was denied in part because the leave was not related to a specific illness [49]. The Seventh Circuit declared that a variety of ailments over a short period of time can rise to the level of a serious illness and reversed the summary judgment for the employer [49].

### **Notice Policies**

Many organizations have internal policies regarding reporting procedures for communicating the need for FMLA leave. Organizations are permitted to have such policies but “employers cannot deny FMLA leave on the grounds that an employee failed to comply with internal procedures as long as the employee gives timely verbal or other notice” [50, at 722] to the employer. Failing to meet notice requirements that are stricter than FMLA regulations cannot be the basis for denying FMLA rights [50].

For example, in *Cavin v. Honda*, a production associate who was in a motorcycle accident informed the company security guard of his accident via telephone as he was leaving the hospital despite a company policy directing such contact be through company administration [50]. He also failed to submit a written request within three consecutive workdays due to problems related to his accident. In ruling against Honda, the court noted that this was an unforeseeable illness and as such Honda’s requirements were neither feasible nor practicable. The court went on to say, “notice should be given as soon as practicable under the facts and circumstances of the particular case” [50, at 723]. In this case this requirement had been met. However, notice to security guards may be denied if they are not company employees and the company has made clear to its workers that it cannot call security (since they are not company workers) as a form of leave notice [36].

### **Failure to Comply with Notice Requirement**

Failure to ask for medical leave in some form and providing enough information indicating that the person may have a serious illness disqualifies one from FMLA protections [51]. Furthermore, neglecting to furnish supervision with medical documentation of the problem so it can determine if the condition meets the definition of a serious illness also disqualifies a person from FMLA protections [52]. In fact, if a worker has not complied with FMLA notice rules and there is no way to contact him or her, management need only demonstrate that it has an honest belief that the person was lying, committing fraud, or abandoned the job in order to prevail [52].

## **MEDICAL CERTIFICATION**

Employers may require worker leave requests to be supported by medical certification for FMLA-qualifying conditions. Persons are ineligible for FMLA benefits in the event the health-care provider does not certify the condition as a qualifying illness [53].

When leave is foreseeable, the employee should provide medical certification before leave begins. When this is not feasible, the employee must provide certification within fifteen calendar days of the employer’s request [6]. This certification

must include the date the condition started, probable duration, sufficient information so that the employer can determine if it is a FMLA-qualifying illness, and if the employee needs intermittent leave or to work on a reduced schedule [6]. Certification rules must be applied uniformly; otherwise they are illegal [54].

Failure to supply medical certification can result in a legitimate dismissal, as occurred in *Urban v. Dolgencorp* [55]. A sales clerk who had taken leave for carpal tunnel surgery was terminated because she failed to furnish management with a medical certification [55]. Apparently, management had even given her a fifteen-day extension. Later, in court it was found that her doctor had misplaced the form, and it had never been mailed. In ruling for the employer, the court pointed out that it was the employee's responsibility to ensure that the certification was received by the proper authorities. The court did note, however, that if the certification had reached the employer before the disciplinary action, management would have had to accept it [55].

When the FMLA form is incomplete, management must give the employee a chance to correct it. Management may not contact the employee's health-care provider for additional information. However, the company health-care provider may contact, with permission, the employee's health care provider for clarifying information [6]. Failure to furnish a certification that has enough information for the employer to determine if the employee has a serious health condition and meets the other stipulations outlined above can also result in termination [56].

In another type of situation, a worker who was scheduled for surgery was told she had to complete a medical-certification form. When it was not forthcoming, a certified letter was mailed to her, giving her fifteen days to submit the completed form. It was never submitted and she was terminated. Accordingly, the appeals court upheld the summary judgment for the employer [57].

## **Second Medical Opinions**

Should the employer doubt the validity of a medical certification, it may, at its own expense, order a second opinion from a health-care provider not in its employment. If the two opinions differ, the employer may direct a third evaluation at its expense, which will be final and binding [6]. The employer must pay travel expenses and cannot require a family member to travel outside his/her normal commuting distance except in very unusual circumstances [6]. Failure to obtain a second or third opinion when the employer doubts the validity of the illness will usually result in an adverse legal ruling should the employer take any disciplinary action against the worker [58].

Neglecting to obtain a second evaluation at the request of the employer is grounds for termination. In *Diaz v. Fort Wayne Foundry*, a foundry worker took leave because of his bronchitis and did not return to work on his scheduled return date [59]. Rather, he called from Mexico, stating that he was under another doctor's care and was being ordered to take another month or so off to recuperate

and sent the company a completed medical certification. The company ordered a second opinion and informed the worker via certified mail to his address of record. However, he never showed for the appointment nor returned to work. He was terminated. He later argued in court that the company knew he was in Mexico. The court dismissed his appeal on the grounds that the company had sent the notice to his address of record. If his address had changed, then he must make arrangements to have his mail forwarded or notify the company of his new address [59].

### **Foreseeable Leave**

Employers may require as much as thirty days notice for foreseeable leave. When this is not practicable, notice must be given as soon as practicable [6]. Whenever there is a change in circumstances (i.e., need to move the date of surgery due to be covered by insurance, etc.), notice must also be given as soon as practical. This does not have to be because of a medical reason. For example, a hospital worker had scheduled breast reduction surgery with advance notice to her employer but was notified by her insurance that it would no longer cover breast reduction surgery after a certain date. As a result, she had to move the date of surgery up to meet coverage rules [60]. This is covered by the change-in-circumstances clause [60].

As long as the leave is foreseeable and can be changed, the employer has the right to request a change in leave dates for business reasons. The employer may also delay commencement of foreseeable FMLA leave to employees who fail to provide timely medication certification until the required certification is submitted [6].

## **SERIOUS ILLNESS**

To qualify for FMLA's benefits, one must usually be experiencing a serious illness to oneself or one's immediate family. The definition of a serious illness is shown in Table 1. Under certain circumstances, a variety of absences under Table 1 Section A would still qualify for FMLA leave even if the employee or family member's absence did not last more than three days (must still be under continuing care of a health care provider) [6]. "For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's health-care provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness" [6, § 825.114 (B) (e)]. None of these problems may last more than three days, but they would still qualify.

Even if a condition is not specifically listed under the FMLA regulations, it still may qualify as a chronic condition not subject to the more-than-three-day absence rule. In *Victorelli v. Shadyside Hospital*, a hospital technician suffered from

Table 1. Definition of FMLA's Serious Illness

- 
- 1) In-patient care (overnight stay) in hospital, hospice, or residential medical facility  
or
- 2) Continuing treatment by a health-care provider that involves any one of the following:
- A)** Incapacity of more (i.e., inability to work, attend school, or perform other regular duties due to condition) than three consecutive days and any subsequent treatment that also involves:  
Treatment two or more times by a health care provider or treatment by a health-care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health-care provider.  
Any period of incapacity due to pregnancy, or for prenatal care.  
Any period of incapacity or treatment due a chronic health condition which:
- a) requires periodic visits for treatment
  - b) continues over an extended period of time
  - c) may cause episodic rather than a continuing period for incapacity (e.g., asthma, diabetes, epilepsy, etc.)
- Permanent/long term conditions due to a condition for which treatment may not be effective but still under supervision of a health care provider (i.e., Alzheimer's, severe stroke, or terminal stages of a disease).  
Multiple treatments (nonchronic conditions):  
any period of absence to receive multiple treatments by a health care provider for restorative surgery after accident/injury or for a condition that would likely result in a period of incapacity of more than three consecutive days' absence, medical intervention such as cancer, severe arthritis, and kidney disease.
- B)** Conditions for which cosmetic treatments are provided are not "serious health conditions" unless in-patient hospital care is required or unless complications develop.
- C)** Substance abuse may be a serious health condition if it meets the definitions outlined above. Absences due to employee's use of the substance rather than treatment are not covered.
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**Source:** Derived from DOL regulations 29 CFR 825.114.

recurring bouts of a peptic ulcer for which she was under a doctor's care [58]. She missed work on a number of occasions, all of which were less than three days. She received a disciplinary warning and was then terminated because of these absences. The hospital defended its actions on the basis that peptic ulcers were not listed in the DOL regulations and won a summary judgment [58]. But, in reversing the decision, the Third Circuit disagreed, saying her condition had been long-term, was incurable, and she was receiving continuing treatment from a physician which met all the DOL requirements [6, 58].

However, “unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc. are examples of conditions that do not meet the definition of a serious health condition” [6, § 825.114 (C)(c)]. Other situations that do not meet the serious illness definition include tardiness [61] and making infrequent visits to a doctor for check-ups [39].

### **Minor Illnesses**

While minor illnesses such as cold or flu are not usually considered serious illnesses under FMLA, there are certain circumstances where they can come under its protection. A senior administrator came down with a severe cold and missed at least six days of work at her doctor’s direction. She was disciplined for missing work. She sued for infringement of her FMLA rights. In deciding for the plaintiff, the appeals court found that she was under a doctor’s care and had seen him twice during this period. This was sufficient to meet the definition of continuing treatment even though he had not prescribed any antibiotics for her [62]. Similarly, an AT&T worker missed more than three days for the flu and was under a doctor’s care. She had seen the doctor twice and had received treatment at least twice [63]. Nevertheless, AT&T argued in court that the flu was not covered under FMLA. The appeals court disagreed, pointing out that all one must do is meet the requirements for a serious illness (see Table 1) [63].

In another case, a packing-and-receiving worker began experiencing diarrhea and stomach cramps, for which she missed more than three days of work [64]. While her physician did not prescribe any prescription medication, he did order tests and saw her on more than two occasions. Because of this, the court felt that the continuing treatment requirement had been met and ruled it to be a serious illness [64].

Conversely, a worker who stayed home with her ill son was not covered. He was sick for only three days and was seen once by a doctor who did not prescribe any medicine [65].

### **Headaches**

In some cases even headaches may be covered under FMLA. In *Wood v. Green*, a clerk working for the county had suffered from cluster headaches for years and would miss four to five weeks of work every few months or so [66]. Finally, management had had enough of his absences and terminated him. Since he had been under a doctor’s care, been treated, and had furnished the necessary medical certifications, a jury later found in his favor [66].

### Serious Illnesses?

There are times, however, when seemingly serious illnesses are not covered because they do not meet the FMLA regulatory definitions. For example, in *Bauer v. Dayton-Walther*, the plaintiff had suffered from rectal bleeding and was under a doctor's care [67]. However, his bleeding was considered so minor that he did not need to miss more than three days of work, received no treatment, and the doctor did not certify him as incapacitated [67]. Regular visits to physicians when the person is not incapacitated are not protected either, not even if the person has a disability [45].

A beef-processor employee suffered a shoulder injury that was diagnosed as a rotator cuff problem [68]. He was ordered to undergo strengthening exercises and prescribed anti-inflammatory medication. However, he was not advised to miss work or to be given light duty restrictions. He was eventually terminated for excessive absenteeism. He filed suit under FMLA. However, his claim was dismissed (upheld on appeal) because of his inability to perform his original job [68].

A person can actually work at another job under FMLA as long as that person is unable to perform his/her primary job and is under a doctor's care (and meets the other requirements of serious illness definition). In *Stekloff v. St. John's*, a psychiatric nurse who was suffering from emotional problems was advised by her doctor to take time off from her job since the work environment was exacerbating her emotional instability [69]. However, during this period she did go through orientation training at another hospital for another job. St. John's argued in court that working for another hospital demonstrated that she was able to perform her job. Nevertheless, the Eighth Circuit disagreed, noting that the key issue was whether or not she was incapacitated for her job at St. John's, where she was unable to perform the essential functions of a psychiatric nurse due to the stressful work environment [69].

## CAREGIVING

The FMLA also provides protection to those who would need time off to take care of a seriously ill family member. "Caring for" means that someone with a serious illness who is "unable to care for their own basic medical, hygienic, or nutritional needs or safety, or is unable to transport oneself to the doctor, and providing psychological comfort and reassurance which would be beneficial to someone that is seriously ill" [6, § 825.116(A)]. For instance, after a food service worker's father's sister was murdered and the father suffered clinical depression, the worker took leave to temporarily care for his father. He took care of the chores around the house and participated in treatment via daily conversations around the house with his father. His employer claimed in part that these actions did not represent "to care for." The courts disagreed [34]. However, moving a seriously ill



child to another country with inferior treatment facilities and leaving him with relatives is not a situation that constitutes “caring for” [70].

### **ON LEAVE**

Employers must continue health-care coverage for affected workers during an FMLA absence [6]. Employees must still pay their share of the premiums [6]. Those on leave can be expected to check in periodically, or supervision may also check on them.

### **Alternative Positions**

In general, if an employee needs intermittent leave or a reduced work schedule for an FMLA condition, including recovering from a serious health condition, the employer may transfer the employee to an alternative position for which the affected employee is qualified [6]. FMLA requires that the affected worker continue to receive the same pay and benefits even though the alternative position may be a lower classification than his/her regular job [1].

### **RETURN TO WORK**

Employees are guaranteed to return to either the same job or a comparable position with no loss of any employment benefit accrued prior to the day of leave [1]. But, to return to work, a person must be able to perform the essential functions of the job or an equivalent position; otherwise s/he may be terminated. Organizations may also require medical certification to return to work. *Rinehimer v. Cemcolift* is a typical case [71]. In this case a manufacturing foreman developed pneumonia and missed thirty days, including rehabilitation [71]. He was then released to return to work as long as he was not exposed to dust and fumes. Accordingly, he was reassigned to other, lesser work since no equivalent positions were available; however, he was kept at the same rate of pay. He was terminated a few months later, after failing to produce medical certification allowing him to work around dust and fumes. His claim that his FMLA rights were breached was denied in part since he could not perform the essential functions of the job [71].

### **Equivalent Positions**

When a person has permanent work restrictions due to an ongoing illness, the employer is not required to return the worker to his/her regular job under FMLA [72]. There may be some obligations under the Americans with Disabilities Act that the employer may need to fulfill. Nevertheless, the organization may place the person in another job if it chooses.

In addition, should a worker be placed in another, equivalent job upon return from FMLA leave and that job does not have the exact duties as the one held before

leave, it does not mean the jobs are not equivalent. In *Montgomery v. The State of Maryland*, an administrative aide returned from leave and was given a job where she had more menial clerical functions, such as answering the phone, taking messages, sharing an office with another worker, etc. [73]. In denying her claim, the Fourth Circuit stated that these differences were de minimis and not truly significant differences, particularly taking into account that she had suffered no reduction in pay grade or benefits [73].

However, significant differences in jobs even with the same title and pay can be a cause of action under FMLA. For example, a secretary for a hospital, after being on FMLA leave, was placed in another position with the same title and benefits but with much more demanding typing requirements. This led to the hospital's motion for summary judgment being denied [74]. Such actions can also generate retaliation claims.

### **Retaliation Claims**

Many organizations lose retaliation claims because they terminate a worker for poor performance stemming from conduct prior to FMLA leave, although the official paper trail (i.e., performance appraisals, etc.) suggests otherwise. *Arban v. West Publishing* is just such a case [75]. Arban had a history of performance problems before going on leave, and management was about to terminate him. But, while on leave, he was asked to still perform some work (in violation of company policy) and was told by his manager that he was very satisfied with his performance and that he had rated him as meeting expectations on his appraisal [75]. Consequently, the Sixth Circuit upheld the jury verdict for the plaintiff [75]. Similarly, a hospital worker was terminated for poor performance two days after asking for leave for brain surgery. The hospital claimed the employee was having performance problems. However, she had just received a significant bonus and raise, and there was no documented record of performance problems [76]. This led to a jury verdict in her favor [76].

Organizations can also lose a retaliation claim for inconsistent treatment. For example, in *Doebele v. Sprint*, a financial analyst was disciplined and then terminated for poor performance and attendance problems [77]. However, the record revealed that many of the absences were FMLA-related (also a violation) and that other employees with similar records had received no discipline. In ruling for the plaintiff, the Tenth Circuit stated this was ample evidence to demonstrate retaliation [77].

In another case, a vice-president of finance's performance began to deteriorate and she was counseled on several occasions [78]. In time she was diagnosed with an autoimmune disorder, which was shown to be related to her poor performance. She began receiving treatment and took about four weeks of FMLA leave. Her supervisor promised to give her another chance if her performance improved upon her return to work, and it did [78]. A short time later she suffered a

relapse and requested FMLA leave again, but she was instead terminated for poor performance. The Seventh Circuit upheld the jury verdict in the plaintiff's favor for several reasons: 1) her performance had improved since her first leave, and 2) management was put on notice for FMLA leave, but did not investigate further to determine the nature of the illness nor the length of leave needed but instead terminated her [78]. Forcing a worker to take sick leave before FMLA leave is permitted can also be retaliation [44].

Negative comments by management often create valid retaliation claims as well. In *Hite v. Vermeer Manufacturing*, an hourly worker requested FMLA leave on a number of occasions but was often told by her supervisor that "I needed to be at work because nothing looks wrong with me. . . . I looked fine to him so I should be at work" [79, at 938]. These comments, in part, caused the Eight Circuit to uphold an adverse jury verdict [79].

### **Layoffs**

Terminations because of a legitimate layoff program are not a cause of action under FMLA. In *O'Connor v. PCA Family Health Plan*, an account executive was slated for termination as part of a reduction in force, but she went out on FMLA leave in the meantime [80]. When the termination list was checked, two other workers on leave were removed from the list but she was not. After termination, she informed management that she was on FMLA leave, and they revised her termination date to the end of her leave. In the subsequent lawsuit, the Eleventh Circuit found that she was not terminated because of initiating FMLA leave and while there was breach of company policy, there was no FMLA infringement [80].

Other restructuring efforts have produced similar outcomes in court [81, 82]. Nevertheless, should a person's job be eliminated and someone else be hired to fill the job, the layoff can be considered retaliation for taking FMLA leave [83].

### **Performance Problems**

As long as an organization can demonstrate that an employee who has taken FMLA has performance deficiencies, disciplinary action will not run afoul of FMLA. Oftentimes, employers are preparing to discipline a worker for documented performance problems just as the employee takes FMLA leave. As a consequence, the employee is terminated upon return from leave. Despite the proximity of the adverse action to FMLA leave, there are no FMLA protections in these situations [84, 85]. This is true even if a person taking leave is terminated because the worker replacing them does a better job [86].

In another common situation, while the employee is on FMLA leave, the employer discovers performance problems of which it was previously unaware and then terminates the employee upon return from leave. *Candis Smith v. Allen Health Systems* is a good example [87]. An administrative secretary for a hospital

foundation took FMLA leave for child adoption, but while on leave it was discovered that she had not mailed receipts for some \$350,000 in donations [87]. There had also been complaints from donors about not getting their receipts. She was subsequently terminated upon return to work. She filed suit under FMLA and argued that her termination for cause was a pretext in retaliation for taking FMLA leave. The Eighth Circuit found no evidence that she was terminated for taking FMLA leave but rather terminated for her performance shortcomings [87].

### **Attendance Problems**

Employers may still terminate employees for excessive absenteeism as long as the absences are not FMLA-protected [88]. Failure to provide enough information about an absence in order to place the employer on notice for a possible FMLA-qualifying condition is not protected either [88].

Employers may also have attendance policies that require workers to call in and report illnesses [89] and that allow supervision to closely monitor and check on those with chronic absentee records [90]. However, employers are not allowed to have policies that violate FMLA. For example, organizations cannot count FMLA leave as an absence under so-called “no-fault” attendance policies [6, 64].

## **CONCLUSIONS**

The FMLA, while noble in purpose, is a complex piece of legislation that employers can easily run afoul of. Nevertheless, from the foregoing discussion a number of do’s and don’ts for administrators can be gleaned:

- Post FMLA posters informing workers of their rights.
- Have an employee handbook that includes FMLA rights and coverages, policy, notice requirements, and procedures.
- If an organization chooses to provide leave coverage to those not covered by FMLA, be sure that it is a written policy and that supervisors are trained to follow it.
- Avoid making verbal promises on FMLA coverage, as these can constitute an implied contract.
- When an organization’s work involves more than one employer, be sure that the organization is not exerting unintended control over individuals in the other organizational entity.
- Use FLSA rules when calculating the hour eligibility requirements for FMLA; include any time related to arbitration awards.
- Be sure to tell employees if they meet the eligibility requirements for FMLA when they request leave; if they qualify, inform them as to when they will be eligible.

- Do not deny key employees job restoration due to the possible adverse motivational consequences.
- Have a clear policy on the requirements for employee notice needed to take FMLA leave.
- Be sure FMLA notice requirements are not more restrictive than FMLA regulations.
- Once an employer is aware that an employee will miss work for whatever reason it should follow up immediately to determine the nature of the problem/illness, regardless of whether the employee has been vague in his/her communications concerning the need for time off.
- Do not discourage workers from taking leave and refrain from making negative comments about their condition, as it is demotivational and may lead to a retaliation claim.
- Train supervisors to understand that not all absences require missing more than three days of work.
- Be aware that placing a worker on sick leave even though s/he has not provided FMLA notice will often be sufficient evidence that management was aware of a serious illness.
- Supervisors should refer potential FMLA cases to the human resources department for evaluation.
- Human resource department personnel must be well-versed in FMLA rules and regulations, procedures, and case law.
- Organizations should regularly make use of ordering second and third medical opinions when in doubt of the validity of an FMLA claim.
- Supervisors should not make decisions about medical issues but defer to physicians/medical evaluations.
- When information/certification forms are incomplete, allow workers more time to provide the additional information.
- Ensure that a person is certified to return to work and can perform the essential functions of the job.
- When placing a worker in another position when s/he returns from leave, confirm that the jobs are equivalent in terms of duties as well as title and pay.
- Make sure performance problems that occurred before leave are documented before taking disciplinary action.
- Workers may be terminated as long as it is for a non-FMLA-related reason, and that reason should be related to documented performance problems or business needs.
- Do not count FMLA absences toward discipline for absenteeism; however, employees may be terminated for non-FMLA-protected absences.

On balance, the FMLA has been good for employees but revisions are needed to alleviate the administrative burden it is placing on employers. As the administration and Congress ponder tinkering with the FMLA, they should carefully

weigh whether to make FMLA leave paid time off as some states such as California are considering or have enacted as it will likely raise the cost of doing business and risk American business's competitive edge relative to foreign competition [91, 92]. However, at a minimum, Congress should consider simplifying the rules governing the definition of serious illness and tighten the regulations permitting leave in any increment. These revisions would reduce the confusion on behalf of both employers and employees, alleviate the administrative burden, as well as discourage misuse of FMLA leave. It would also promote achievement of the act's purpose of balancing both employer and family needs.

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