

Family Medical Leave Act

A Seminar Memorandum

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INTRODUCTION

The passage of the Family Medical Leave Act (FMLA) created an across-the-board, routine employment benefit designed to ensure that family care would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and to prevent employers from evading leave obligations by simply hiring men instead of women.

The FMLA establishes a private right of action to seek both equitable relief and monetary damages “against any employer in any Federal or State court of competent jurisdiction,” in the event that an employer should “interfere with, restrain, or deny the exercise of” FMLA rights. The damages recoverable under the Act are strictly defined and measured by actual monetary losses. The accrual period for back pay is limited by a two-year statute of limitations, which is extended to three years in cases of

justified discrimination against women when they are mothers or mothers-to-be.” Reinforced by a parallel stereotype which presumed a lack of domestic responsibilities for men, this belief formed part of the foundation of a structure of practices which resulted in unequal conditions in the workplace.

By and large, employers tended to regard the family as a woman’s domain, and while they were willing to offer domestic leave opportunities to women, they often denied men similar accommodations or discouraged men from taking them. Similarly, women were seen as second-class workers, likely to place the needs of family life ahead of the requirements of their jobs. The resulting self-fulfilling cycle of discrimination left women little choice but to continue in the role of primary caregivers to their families, which in turn reinforced

willful violations of the Act.

Background

When Congress enacted the FMLA in 1993, it had before it plentiful evidence of a long and extensive history of gender discrimination with respect to the administration of leave benefits. The record showed reliance on the mutually-reinforcing stereotypes that only women are responsible for family care-giving, and that men lack substantive family responsibilities in the home.

Congress found that “historically, denial or curtailment of women’s employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second. This prevailing ideology about women’s roles has in turn

employers’ notional views about women’s commitment to work and their value as employees.

Congress reasoned that these perceptions would lead to subtle discrimination in the workplace that might be difficult to detect on a case-by-case basis. Congress determined that a federal solution to this conundrum was needed, since even in states where the laws were neutrally written, they were applied in a discriminatory manner.

The FMLA was drafted and passed to take positive legislative action against these stereotypes, decreasing discrimination against women in the workplace and ensuring that both men and women are equally able to take leave time benefits to help care for their families.

Requirements

Many states have their own family leave acts, which may differ widely from the federal legislation. This memo focuses on the federal FMLA. Generally speaking, the federal FMLA provides a floor upon which the States are relatively free to build, so long as the provisions of the federal Act are not eroded. Similarly, there will be cases where collective bargaining agreements will bear upon FMLA rules, although these agreements may not negate the protections guaranteed under the Act.

The FMLA only affects unpaid leave, not standard vacation time. For its protections to apply to an employer, two requirements must be satisfied:

- 1) the employer must have a minimum number of employees; and
- 2) affected employees must have worked for that employer for a required amount of time.

A company must employ 50 or more workers at a given work site, or a total number of 50 or more workers within a 75 mile radius, before its employees are affected by the provisions of the FMLA. Further, the rules of the Act do not apply to employees in high-ranking or sensitive positions, including state elected officials, their staffs, and appointed policymakers. Such high-ranking employees, even though they are not themselves subject to the Act, still count as workers for the purposes of determining whether a company meets the 50-or-more worker requirement.

The second requirement is that an employee must have worked for the company for at least one year and must have provided at least 1,250 hours of service within the last 12 months of

employment. The employee need not have worked for the employer for twelve consecutive months in order to satisfy the “at least one year” requirement, and the 1,250 hours include only those hours actually worked for the employer. Paid leave and unpaid leave, including FMLA leave, are not included in the calculations of these figures.

An eligible employee who has met the FMLA’s notice and certification requirements, and who has not exhausted his or her FMLA leave for a given twelve-month period, may not be denied requested FMLA leave.

The FMLA also imposes certain posting, notice and record keeping requirements on employers. All employers included in FMLA coverage, whether or not they have eligible employees, are required to post and keep posted on their premises, in conspicuous places where workers are employed, notices explaining the Act’s provisions and providing information on how to report violations of the Act to the Wage and Hour Division. These notices must be posted prominently where they can be readily seen by employees and applicants for employment.

The statute also stipulates that covered employers must make, keep, and preserve all records pertaining to their FMLA obligations in accordance with the record requirements of the Fair Labor Standards Act. These records include:

- basic payroll and identifying employee data, including name, address and occupation;
- rate or basis of pay and terms of compensation;
- daily and weekly hours worked per pay period;
- additions to or deductions from wages,

- and total compensation paid;
- dates FMLA leave was taken;
- copies of employee notices of leave furnished to the employer under FMLA, if in writing, and copies of all general and specific written notices given to employees as required under FMLA;
- any documents describing the employee benefits or employer policies and practices regarding the taking of paid and unpaid leave;
- premium payments of employee benefits; and
- records of any dispute between employee and employer regarding taking FMLA leave.

It is prudent for employers to periodically send notices to employees reminding them of their FMLA rights, although this step is not required by statute. This proactive tactic has two purposes. The first is to weaken an employee's potential argument that he or she was not aware of the FMLA and its provisions because of failure by the employer to properly notify workers. The second, provided that the employer does make a good faith effort to determine whether an employee is eligible for FMLA leave, is to reduce the likelihood that the employer will be found guilty of a willful violation of the Act.

As mentioned previously, willful violation of the Act extends the statute of limitations in which a claim may be filed from two years to three.

Benefits under the FMLA

In essence, the FMLA guarantees that eligible employees may take up to twelve work weeks of unpaid leave annually for any of the following reasons:

- 1) For the birth of a child of the employee and in order to care for the child;
- 2) For the placement of a child with the employee by adoption or via foster care;
- 3) For care of a spouse, child, or parent of the employee, in the case of a serious health condition; or
- 4) For the treatment or management of a serious health condition that makes the employee unable to perform his or her functions.

It should be noted that an employee is entitled to remain covered by the employer's group health plan while on FMLA leave.

It is an employer's responsibility to designate leave, paid or unpaid, as qualifying for FMLA, and to notify the employee in writing of the designation. The decision to designate leave as qualifying under the FMLA must be based solely on information the employee or employee's representative has provided.

An employer may allow a worker to substitute paid accrued vacation time to which he or she would otherwise be entitled, or existing personal or sick days, for FMLA leave taken to care for a serious health condition. This is the employer's choice. If a company does choose to allow the substitution of paid leave for unpaid leave, it is recommended that the employer develop a uniform policy to govern such substitutions. The benefit of a uniform policy is that it provides guidance to managers and reduces the number of case-by-case determinations a supervisor will have to make. It also has the benefit of making it less likely that employees can reasonably claim that they were unlawfully denied FMLA leave because their supervisor did not like them, or for other similar reasons.

Additionally, FMLA leave and Workers' Compensation leave can run together, provided that the reason for the absence is due to a qualifying serious illness or injury and that the employer properly notifies the employee in writing that the leave will be counted as FMLA leave. Pregnancy disability leave or maternity leave for the birth of a child qualify for FMLA protection as serious health conditions and may be counted in the twelve weeks of total time so long, again, as the employer properly notifies the employee in writing of the designation.

In most situations, an employer cannot retroactively count leave as FMLA leave. However, if an employer did not know the reason for a staff member's absence, leave may be retroactively designated for FMLA limits while it is in progress or within two business days of the employee's return to work.

In general, leave taken under the FMLA for the birth or placement of a child is not taken intermittently or on a reduced schedule unless the employer and employee agree otherwise. On the other hand, leave taken for the care of a serious health condition of an employee or family member may be taken intermittently or on a reduced leave schedule when medically necessary. This will not result in any reduction of leave time available to an employee. For example, intermittent leave might be taken for scheduled chemotherapy treatments or for prenatal examinations in the case of a pregnant worker.

Barring union contract provisions or state law to the contrary, an employer can, with or without the employee's permission, require an employee to exhaust any paid leave normally remaining to him or her before unpaid leave begins.

An employee is free to return from leave early. The employer must promptly restore the employee to her or his prior position. If the position has been filled then the worker must be restored to a similar or equivalent position. Courts are skeptical of an employer's intentions if a returning worker is restored to a lower pay grade or salaried position, although a company may restore an employee to a lower position if the previous position was eliminated in the normal course of business. In cases like this, employers must generally demonstrate that the lost position would have been eliminated in any case, even if the worker had never asked for or taken FMLA leave.

Definitions

As in many federal regulations, the terms used in determining eligibility requirements for FMLA time are specific, in order to apply to many different circumstances. Here is a precise description of the terms used to calculate whether a worker is entitled to FMLA leave time.

Employer - An employer is defined as any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar work weeks in the current or preceding calendar year.

Serious Health Condition - an illness, injury, impairment, or physical or mental condition that involves inpatient care in a hospital, hospice, or residential medical care facility, or continuing treatment by a health care provider.

A *Child* includes a biological, adopted, or foster child, stepchild, legal ward or a child of a person standing *in loco parentis* who is under 18 years of age, or 18 years of age or older and

incapable of self-care because of a mental or physical disability.

Spouse - a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized.

An employer can use one of the following definitions for the 12 month period of work which in part qualifies a worker as eligible:

1. The calendar year;
2. Any fixed 12-month “leave year,” such as a fiscal year, a year required by State law, or a year starting on an employee’s “anniversary” date;
3. The 12-month period measured forward from the date of any employee’s first FMLA leave begins; or,
4. A “rolling” 12-month period measured backwards from the date an employee uses any FMLA leave

A company should adopt a single system for all employees when performing this calculation, or for as many employees as feasible. This simplifies calculations to determine whether an employee is eligible for leave, or whether he or she has leave time remaining, and will help ensure that the calculations will be performed fairly and equally for all staff.

Birth or Foster Care/Adoption of a Child

Two of the four statutory categories for leave qualification apply when a worker is involved in childbirth, or is adopting or assuming the foster care of a child. In such cases, the employee must provide his employer with 30 days’ notice before the leave date begins, if the event is

foreseeable. Where it is not foreseeable, the employee must provide as much notice as is practicable. This provision provides the employee with some flexibility in case of unforeseen events, but also ensures that the employer will have time to adjust to the pending absence in the workplace.

The entitlement to FMLA leave under these provisions expires at the end of the twelve-month period beginning on the date of the birth or placement of the child, unless state law or the employer permits a longer period. Thus, an employee will be able to take FMLA leave shortly before or immediately after the birth or adoption of a child, or opt to postpone the leave some months thereafter.

Serious Health Condition

The other two leave categories involve serious health conditions or the care of close family members with serious health conditions. The provisions do not apply to in-laws. If the treatment or times of care are foreseeable, then the employee is required to make a reasonable effort to schedule treatment so as not to unduly disrupt the operations of the employer. Such scheduling is subject to the approval of the health care providers involved. As above, the employee must provide his or her company with the anticipated date of the leave at least thirty days before it starts, where possible. If the leave must begin in less than 30 days, the employee shall provide as much notice as is practicable.

An employer may require that a request under these provisions be supported in a timely fashion by a certification issued by the health care provider of the eligible employee or family member. Certification may be required for mental conditions as well as physical conditions. The employer may choose to provide employees

with a prepared form that a physician or healthcare provider can fill out and submit to the company.

This certification is only necessary if the employer requests it. If a company does opt to request certification, it must also inform its employees of the consequences of failing to provide a proper response. If the FMLA leave is foreseeable, an employer may delay the leave should an employee fail to provide certification after being requested to do so.

The medical certification must include all of the following, as applicable:

- 1) the date on which the serious health condition commenced;
- 2) the probable duration of the condition;
- 3) the appropriate medical facts within the knowledge of the health care provider regarding the condition; and either
- 4) if the leave is requested to care for the child, spouse or parent of the employee, a statement confirming that the eligible employee is needed to care for this family member, and an estimate of the amount of time required for the care; or
- 5) if leave is for the employee, a statement that she or he is unable to perform the functions of the position due to the health condition.

A certification does not include copies of an employee's medical records.

If a company has reason to doubt the validity of an employee's certification, it may require, at its own expense, that the employee obtain the opinion of a second health care provider designated or approved by the employer. This second opinion health care provider may not be employed on a regular basis by the company.

Should there be a conflict between the initial certification and the second opinion, an employer may require, again at its own expense, a third opinion from another health care provider. This third provider must be designated or approved jointly by the employer and the employee. The opinion of this third health care provider is considered to be final, and is binding on the employer and the employee.

In cases where the leave extends over time, an employer may require subsequent recertifications on a reasonable basis. In the event that an employee fails to provide subsequent medical certifications, the employer may deny continuation of FMLA serious health condition leave.

The FMLA permits an employee to take leave to receive "continuing treatment by a health care provider," which can include recurring absences for therapy treatments such as those ordered by a doctor for physical therapy after a hospital stay or for treatment of severe arthritis. However, these subsequent or continuing treatments must be related to a serious health condition.

While on Leave

Employers who already have established policies regarding outside employment for staff who are on paid or unpaid leave may uniformly apply those policies to employees on FMLA leave. If no such policies exist, an employer may not restrict these activities. The FMLA's protections will not apply in situations where the reason for leave no longer exists, where the employee has not provided required notices or certifications, or where the employee has misrepresented the reason for leave.

An employer may ask an employee questions to confirm whether the leave needed or being

taken qualifies for FMLA purposes, and may require periodic reports from the employee on her or his status and intent to return to work after the leave is completed. In the case of medical leave, the employer is not entitled to information regarding a worker's or family member's health care condition beyond what is necessary to satisfy a certification request.

Restoration to Position After Leave

In essence, during FMLA leave the clock simply stops on a worker's tenure with a firm, starting up again upon his or her return as if no time had passed. An employee who has taken a leave protected under the FMLA must be restored to his or her prior position of employment upon returning to the workplace, or be restored in any case to an equivalent position with equivalent employment benefits, pay, and other similar terms and conditions of employment.

The language and intent of the FMLA is clear and straightforward. Taking protected leave may not result in the loss for most workers of any employment benefit established prior to the beginning of the leave. Nothing in the Act entitles any restored employee to accrue seniority or employment benefits during any period of leave or to obtain any right, benefit, or position of employment other than that to which the employee would have been entitled had the employee not taken the leave. However, should such matters be governed by a collective bargaining agreement, then that collective bargaining agreement shall govern.

Employers are prohibited from using FMLA leave as a negative consideration in employment actions, including hiring, promotion or the imposition of disciplinary actions. It may not be counted under "no fault" attendance policies. In

limited circumstances, which are detailed in the next section, certain highly-paid salaried workers, considered "key" employees, may be denied reinstatement to their prior work positions. However, such employees can not be prevented from making use of FMLA leave in the first place.

As a condition of restoration for an employee who has taken leave for a serious medical condition, a company may require that the employee provide certification from the appropriate physician or health care provider that she or he is able to resume work. If an employer will choose to require such a certification from a returning worker, then there should be a uniform policy requiring the same certification for all employees returning from FMLA leave taken because of their serious health conditions. State or local law, as well as any collective bargaining agreements that govern the return to work of such employees, will supersede any FMLA requirements.

The rights afforded workers under the Act are designed only to "restart the clock" after a leave is completed, not to provide any bonuses to standard employment. Thus, an employee has no greater right to reinstatement or to other benefits after an FMLA leave than if she or he had worked continuously.

Employers are not required to continue FMLA benefits or to reinstate employees who would have had their employment terminated if they had worked through their FMLA leave period. For example, if an employer has the misfortune to undergo extensive general layoffs while an eligible worker is on leave, the protections of the FMLA do not require that the worker be returned to a job that otherwise would not exist. In such a case, the burden of proof will be on the employer to show that the

employee would have been fired or laid off even if they had never taken or asked for FMLA leave.

An employee who gives unequivocal notice that he or she does not intend to return to work loses his entitlement to FMLA leave. Employees who are unable to return to work after exhausting their twelve guaranteed weeks of FMLA leave in the designated 12 month period will also no longer have FMLA protections of protected leave or job restoration.

As is often the case with laws drawn to protect rights in the workplace, an employer may not fire an employee for complaining about an FMLA violation, nor can the employer take any other adverse employment action on that basis. It is unlawful for employers to discharge or otherwise discriminate against an employee for opposing a practice made unlawful under the FMLA. If an employee is fired after making such a complaint, in the ensuing litigation the burden will be on the employer to prove that the employee was fired for legitimate cause, and not due to allegations of an FMLA violation.

Exemption Concerning Certain Highly Compensated Employees

Under certain circumstances, the FMLA may not offer its protections to a “key employee” of a company. A “key” is a salaried employee who is otherwise FMLA-eligible and is among the highest-paid 10 percent of all the employees within 75 miles of his or her work site. In calculating the highest-paid 10 percent, it is proper to include both salaried and non-salaried employees.

In denying restoration to a key employee, a company must determine that the restoration will cause “substantial and grievous economic

injury” to the operations of the employer. It is important to note that any difficulties claimed or suffered by the company during the key employee’s protected absence may be considered in this analysis – only the realities of returning the employee to the protected prior position may be factors in such a showing of “substantial and grievous economic injury.” Minor inconvenience does not rise to this level. Rather, the reinstatement of the employee must threaten the economic viability of the company, or must be seen to cause substantial, long-term economic injury to the firm.

Penalties for Violating FMLA

If an employer is found to have violated one or more provisions of FMLA, then an employee may receive one or more of the following: wages, employment benefits, or other compensation denied or lost by reason of the violation.

Where an FMLA violation does not result in the tangible loss of salary or benefits, as for example when a properly eligible leave is unlawfully denied, damages will be assessed for any actual monetary loss sustained by the employee as a direct result of the violation, such as the cost of providing care, up to an amount equal to 12 weeks of wages. Additionally, the employee may be entitled to interest on such sum, calculated at the prevailing rate. A similar amount may also be awarded as liquidated damages. A court has the discretion to reduce the total of the penalties if it finds that the violation was in good faith, and that the company had reasonable grounds for believing it had not violated the Act.

In appropriate circumstances, an employee may also obtain equitable relief such as employment, reinstatement, and promotion.

When the employer is found in violation, a worker may also recover reasonable attorney's fees, reasonable expert witness fees, and other

costs of bringing the action, in addition to any judgment awarded by the court.

CONCLUSION

Congress designed the Family Medical Leave Act as a limited remedy aimed at a specific aspect of gender discrimination in the workplace, which was found to limit women's career success based on the belief that they were likely to turn away from employment in favor of tending to their families.

The resulting Act is moderate and limited in scope, and does not attempt radical alterations in commerce. It robustly guarantees that both male and female employees of larger companies can have access to ample unpaid vacation time to address illness, family care, and child-rearing, without fear of recrimination or loss of their jobs when they are able to return to work.

The Act also includes safeguards for employers, who may reasonably expect that disruptive guaranteed leave will be mandated only in cases of serious illness, pressing family

crisis, and the birth or adoption of a child.

Employers can consider the FMLA as a codification of the inevitable, a malleable tool which, wielded correctly, will foster responsibility, contentment, and respect in the workplace, as well as keeping skilled and experienced employees in the workforce. It is not meant to be used frivolously, and contains safeguards for both the employer and the worker.

Correct application of the requirements of the FMLA can be accomplished without undue burden on an employer. The best way for a large company to approach the Act is as a flexible set of guidelines which provide both employers and employees with a common ground on which they can meet each others' needs fairly and openly.