Unravelling the Mysteries of the Family and Medical Leave Act

By Daniel A. Schwartz and Christopher Engler

Just as the Patient Protection and Affordable Care Act (ACA) was the signature health care achievement of President Barack Obama's first term, the Family and Medical Leave Act (FMLA) was an early health-related priority for President Bill Clinton. Its acronym is now firmly in the lexicon of lawyers, politicians, and the public. But despite being the law of the land for more than two decades, the FMLA remains a source of trepidation and confusion for attorneys, judges, and clients. No article could attempt to solve all the mysteries associated with the law, but we'll try to resolve at least a few.

Although this article will focus exclusively on the federal FMLA, it's worth noting that several states have enacted laws guaranteeing somewhat greater family and medical leave benefits than the FMLA; Connecticut has gone even further by offering paid sick leave for some workers. This article will not tackle such state-by-state provisions, but there are ample online resources for lawyers and employers to do so.

Simply stated, the FMLA provides eligible employees with unpaid leaves of absence for certain family and medical reasons. From this general proposition we can pull three key questions. First, what sort of leave does the FMLA provide? Second, for which medical or family reasons may someone take leave? Third, what is an eligible employee? We will tackle the first two questions together before moving on to the third.

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BENEFITS

The purpose of the FMLA is to provide eligible employees with unpaid and job-protected leave for certain medical and family reasons and to ensure their return to the same position.

The first and most obvious takeaway from this and the most misunderstood provision is that the leave is unpaid, not paid. Although some employers might allow (or be required by contract to allow) their employees to receive pay during an FMLA leave, such as by utilizing sick or vacation time, such conduct is not required by the federal law.

A second point is the nature of the job protections. Following the end of an employee's FMLA leave, that employee must be returned to the previous job or an equivalent job. An "equivalent" job must have similar terms and conditions of employment, including salary and benefits. On a related note, the FMLA also requires employers to continue an employee's health insurance coverage during the employee's FMLA leave as if the employee had not taken a leave. In other words, if the employer usually pays 90 percent of premium costs, it must continue doing so during the employee's

PAID SICK LEAVE -

Although the FMLA does not require that a leave of absence be paid, this fact is not necessarily the end of the story. A growing number of cities and states have enacted legislation guaranteeing paid sick leave for some employees.

San Francisco became the first jurisdiction to guarantee paid sick leave in 2006. The city's law, which was enacted by a ballot initiative, provides paid sick leave to all employees. Other major cities, including New York City and Washington, D.C., have since followed suit in some manner. In places such as New Jersey, where a statewide bill has not yet been considered by the full legislature, municipalities both big and small have taken it upon themselves to pass ordinances.

On the state level, Connecticut took the lead when its paid sick leave law went into effect on January 1, 2012. With some exceptions, this law applies to employers with 50 or more employees and provides an hour of paid sick leave for every 40 hours worked (up to 40 hours per year). However, it only applies to "service workers" who work in one of 68 listed occupations. As of February 2015, California and Massachusetts have both passed similar laws. Both states' laws are more generous than Connecticut's, in terms of both breadth of eligibility and rate of accrual of paid sick leave. Other state legislatures across the country have considered or are considering variations of these laws.

The future of paid sick leave is hard to predict. A bill guaranteeing some form of paid sick leave has been introduced in Congress regularly since 2004. However, even if Congress were to pass a uniform law that applied nationwide, the legislation already enacted by states and municipalities would continue in effect unless the federal law was more generous. In the meantime, expect this trend to continue in a patchwork pattern.

A key remaining question is how the growth of paid sick leave will affect the FMLA. While the variety of eligibility requirements and benefit guarantees makes it difficult to generalize, it seems safe to say that the two types of leave will at most complement each other. That is to say, just as many employers who voluntarily grant paid sick leave already require an employee to utilize any available paid time off as part of an FMLA leave, so, too, will many of the employers covered by these new requirements. As a result, the mechanics of FMLA leaves will not be significantly affected.

leave. The employee remains on the hook for the remaining 10 percent.

The leave entitlements are relatively straightforward. The FMLA grants up to 12 weeks of leave during a 12-month period (which can be calculated in different ways by an employer) for any of a number of reasons. Permissible reasons are the birth, adoption, or foster placement of a child; caring for a spouse, child, or parent with a serious health condition; the employee's own serious health condition; or certain "qualifying exigencies" related to the fact that a spouse, child, or parent is on active duty in the military. In addition, the FMLA also grants up to 26 workweeks during a 12-month period to care for a member of the military with a serious injury or illness if the servicemember is the employee's child, spouse, parent, or next of kin.

To qualify for standard FMLA, an employee's own serious health condition must render the employee either unable to work or unable to perform an essential function of the job. The serious health condition of an employee's spouse, child, or parent may also be a trigger if that family member is unable to care for him- or herself or is in a condition that necessitates the employee to provide transportation or psychological comfort to the family member.

But the FMLA is not without its quirks. For example, the FMLA does not require that the leave be taken all at once. Employees can take intermittent FMLA leave using only a few hours at a time, either on a regular basis or periodically. An employee taking intermittent leave still only receives the equivalent of 12 weeks of leave.

In order to use FMLA leave, an employee must comply with the employer's standard requirements for requesting leave. The employee must also provide enough information for the employer to decide if the requested leave could be an FMLA leave. The FMLA requires employees to request leave at least 30 days in advance when possible, but it recognizes that an employee's need for a leave is not always foreseeable.

The FMLA has obligations for employers, too, including the requirement to provide notices. In addition to posting information about the FMLA on the company's bulletin boards or handbook, the employer must recognize when an employee's requested leave falls under the FMLA. The employer must then inform the employee of his or her rights and eligibility under the FMLA. Reading between the lines, this requirement puts the burden of classifying a requested leave as FMLA leave on the employer, not the employee who makes the request. The employee need not even mention the FMLA in his or her request; it's up to the employer to take action.

However, the employer does not need to take an employee's request for leave at face value. If the request relates to the serious health condition of the employee or a covered family member, an employer can require medical certification from a health care provider. The employer can even require second or third opinions.

The FMLA provides employees with two options for enforcing their rights. They can either file a complaint with the U.S. Department of Labor's Wage and Hour Division or bring a private lawsuit. Although there is some debate about the causes of action provided by the FMLA, an employee's claim will generally fall into one of two categories: interference or retaliation. In an interference claim, the issue is simply whether the employer somehow prevented the employee from exercising his or her rights under the FMLA. A retaliation claim alleges that the employer subjected the employee to an adverse employment action because of the employee's exercise of rights under the FMLA. FMLA retaliation claims resemble retaliation claims under anti-discrimination statutes.

ELIGIBILITY

There are four prongs to the FMLA eligibility analysis. Two of these relate to the individual's employment history and

two relate to the individual's employer.

First, the employee must have worked for his or her current employer for at least 12 months. Generally speaking, the 12 months do not need to be consecutive. As a result, seasonal workers will often satisfy this requirement even if they work only a few months each year. Employees who leave a job and return later will also often qualify, as long as the break in service was less than seven years. Even if the employee's break in service was longer than seven years, other sources of law—such as a collective bargaining agreement or the Uniformed Services Employment and Reemployment Rights Act (USERRA)—may require an employer to count the employee's time worked cumulatively.

Second, the employee must have logged at least 1,250 hours for his or her current employer in the previous year. For the purposes of this requirement, the FMLA looks at the 12-month period immediately preceding the employee's leave of absence. As a point of reference, an employee working 40 hours each week will log 2,080 hours in a year. This 1,250-hour requirement translates into full-time work for roughly 31 weeks, or 24 hours per week for a full year. Therefore, employees who regularly work half-time or less will typically not be eligible for FMLA, and neither will seasonal employees who work for an employer for a few months per year.

Third, the employee must work at a worksite that is within 75 miles of at least 50 employees of the employer. A worksite can be a single location or a group of adjacent buildings, such as a college campus. An employee's worksite is the location to which the employee usually reports. For employees without a fixed worksite, such as traveling salespeople and construction laborers, the Department of Labor's regulations use the location from which the employees' work is assigned. The distance is not measured as the crow flies but as the employee drives. In other words, the analysis considers the shortest distance via roads and highways to determine what lies within 75 miles. Suffice to say that this analysis is easier with a website such as Google Maps.

Fourth and finally, the employee must work for a covered employer. It is the expansive definition of this term that gives the FMLA such a broad reach. Different definitions apply to the public and private sector. In the public sector, a "covered employer" is any public agency, regardless of how many employees it has. All federal, state, and local government agencies are considered public agencies under the FMLA. By regulation, the Department of Labor has clarified that the definition also includes both public and private schools. Therefore, the FMLA applies equally to an enormous federal agency with tens of thousands of employees and a small rural police department with only a handful of deputies. Of course, some states have different ideas, but we'll save that for another article.

The definition is somewhat more complicated in the private sector. A "covered employer" is any private employer that has employed at least 50 employees in at least 20 workweeks in the current or previous calendar years. In calculating whether an employer meets this threshold, the Department of Labor's regulations count all employees who are on the employer's payroll on the first working day of a given calendar week. Therefore, an employee who starts work on a Wednesday will not count for that week if the employer's workweek is Monday through Friday.

THE ADA AND THE FMLA

Extended leaves of absence have become the source of discussion in the courts in decisions other than those found in the FMLA. Increasingly, courts are concluding that additional leave time may be required as a reasonable accommodation under the Americans with Disabilities Act (ADA) or its state analogues.

The ADA requires that employers implement reasonable accommodations to their workers with mental or physical disabilities so that the workers can perform their jobs. The employer and the employee are expected to engage in an interactive dialogue to determine the employee's needs and whether an accommodation would pose an undue hardship on the employer. Notably, an employer need not adopt the worker's first choice, so long as the chosen reasonable accommodation is effective. However, in many cases the courts are determining that there might not be an alternative to the employee's preference when the employee is temporarily unable to do his or her job.

This trend raises several questions. For example, how much additional leave must an employer grant? Must the employer continue extending the leave if the employee's condition worsens? At what point can an employer refuse to continue granting extended leave? On this latter question, at least, some courts have set forth a clear standard. If the employee cannot provide reasonable assurances that he or she will be able to return to work at a fairly definite point in the future, the employer will not be expected to give an interminable leave of absence. (Of course, given the abundance of litigation on this issue, it is likely that other courts will disagree.)

When might this issue arise? In many recent cases the ADA has come into play when the employee has exhausted his or her allotment under the FMLA or when FMLA leave is otherwise unavailable (e.g., if the employee did not work enough hours). Cases have involved both physical disabilities (e.g., severe complications from a pregnancy that prevented the employee from working for over a year) and mental disabilities (e.g., an employee whose anxiety and panic disorder required him to be out of work for an extended period).

To the extent that a pattern can be identified, it seems clear that courts will not require these extended leaves of absence to be paid. On the other hand, the courts will require an employer to return the employee to an equivalent or similar job at the end of the leave. Whether an employer must continue contributing to an employee's health insurance is more of an open question.

As a result of this growing litigation, attorneys and their clients would be wise to remember that other laws might impose leave-related rights or obligations, even when the FMLA is silent.

However, for purposes of determining who is "on the payroll," part-time and full-time employees are counted equally. Employees who are temporarily out of work on paid or unpaid leave are also counted, so long as the employer expects that the employees will eventually return to active duty. This would include employees taking FMLA leave and even employees who have been suspended for disciplinary reasons.

An employee's FMLA eligibility is unrelated to the "covered employer" analysis.

To better understand how these concepts work together, consider a commercial landscaping company. This company serves customers throughout a mid-sized metropolitan area. The company employs four full-time office workers year-round at the company's office. The company also employs two mechanics who work 20 hours per week throughout the year maintaining the company's landscaping equipment, also at the company's office. Each May, the company hires 45 seasonal workers. These landscapers work throughout the spring and summer and are laid off in October when the seasons start to turn. Their hours during this period vary depending on the weather and customer demands.

In any given December, which employees are eligible for FMLA leave?

Start with the "covered employer" analysis. Because this is a private company, the 50-employees/20-weeks threshold is at issue. For six months (January through April and November through December), the company has only six employees on the payroll. However, during the landscaping season the company employs 51 employees. It does not matter that the mechanics work half-time or that the landscapers have inconsistent hours. The landscaping season is roughly six months, which exceeds the 20-week requirement. As a result, the company is a covered employer. Tweaking the facts slightly, assume that both mechanics were fired the prior year for joyriding in a tractor. Although this modification brings the company's labor force down to 49 employees for the current year, the company remains a covered employer because it satisfied the requirement in the previous calendar year. Similarly, if both mechanics had been suspended for their misconduct instead of being fired, the company would have fewer than 50 active employees. Nevertheless, if the company reasonably expects the two mechanics to return to their jobs at the conclusion of the suspension, both workers are counted and the threshold is met.

All employees also satisfy the worksite requirement. The company's office is clearly the worksite for the four office workers and the two mechanics. As for the seasonal landscapers, even if they go straight to their worksites and do not report to the company's office each day, they all get their daily assignments from the central office. The central office is therefore regarded as the worksite for all employees.

Turning to the 12-month longevity requirement, the analysis is straightforward for the year-round office workers and mechanics. For the seasonal landscapers, the key question is whether each of the workers also worked for the company in previous years. Because the 12 months need not be consecutive, two six-month stints with the company would suffice to satisfy this requirement.

Finally, each employee's hours of service in the past year must be considered. Again, this analysis is straightforward for the full-time office workers. At 40, or even 35, hours per week, these employees easily surpass the 1,250-hour requirement. In contrast, the mechanics do not satisfy this requirement. Their 20-hour-per-week schedule nets only 1,040 hours per year. They are therefore not eligible for FMLA leave. The seasonal workers are also probably ineligible. A six-month employee would need to average 48 hours per week to meet the eligibility threshold. Given the inconsistency of the landscapers' schedules, on these facts it is unlikely that any of them worked that many hours.

This example highlights an important element of FMLA eligibility: An employee's eligibility has no relationship to whether the employee is counted for the "covered employer" analysis. There is no requirement that the employees have worked a minimum number of hours or months before being counted. The "covered employer" threshold is more of a snapshot analysis—it simply looks at how many people are on the employer's payroll, without regard to the employees' work histories or other characteristics. Conversely, merely being counted for purposes of the threshold does not transform an otherwise ineligible individual into an eligible employee.

CONCLUSION

At its core, the FMLA strives to enable employees to care for themselves and their families with minimal disruption to themselves or their workplaces. With clear and open communication between the requesting employee and his or her employer, both parties can help ensure that this goal is achieved. ■

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