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THE FMLA AFTER FIVE YEARS

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The Family Medical Leave Act ("FMLA")[1] turned five in August of 1998. While the evolution of the law has not been smooth, five years of FMLA litigation has helped shape and define this legislation. As a result, in 1999, employers should be able to implement the FMLA with somewhat more confidence than they could in 1993.

The FMLA was enacted to help employees balance the demands of work and personal life by requiring employers with 50 or more employees to provide eligible employees[2] with up to 12 weeks of unpaid leave in any 12–month period because of: (1) the birth of a child; (2) the placement of a child with an employee through adoption or foster care; (3) the employee's need to care for a spouse, child, or parent with a serious health condition; or (4) the employee's serious health condition which makes the employee unable to perform the essential functions of his or her job.[3]

As often happens with major legislation in the employment area, the passage of the act has been followed by a torrent of litigation.[4] While not every issue that can and does arise under the FMLA has been ironed out, the courts recently have provided answers, or at least direction, to some frequently litigated questions. The following is a very brief survey of some of this case law.

Serious Health Condition

The FMLA handles the issue of what is a serious health condition in a manner that attempts to make doctors out of employers, lawyers, and judges. In effect, the regulations define an illness as a serious health condition when the employee (or family member) is incapacitated for more than three consecutive days and requires treatment by a health care provider.[5] What litigation has revealed about this issue is that it is very fact-specific, and what may constitute a serious health condition in one case, may not in another. There are some general guidelines nevertheless. For instance:

- A serious health condition may be made up of combined health problems that individually would not constitute a "serious health condition."[6]
- An employee's own opinion that she is incapacitated will not entitle her to FMLA leave.[7] She needs a health care provider's opinion.
- A Department of Labor opinion letter takes the position that minor illnesses (such as minor ulcers or the flu) may qualify for FMLA leave if the illness requires more than three days of consecutive incapacity and continuing treatment by a health care provider.[8]

- Pregnancy is not "a serious health condition" unless the employee is unable to work due to the pregnancy.[9] One court has held, however, that an employee suffering from severe morning sickness, unlike other serious health conditions, does not need to show she is being treated by a health care provider to establish incapacity.[10]

Sufficient Notice

What constitutes sufficient notice of FMLA leave and rights is also a heavily fact–dependent issue; however, a few cases are instructive as to what constitutes adequate notice. For instance, if an employee fails to give her employer adequate information about her illness, so that the employer has reason to believe the absence might be covered under the FMLA, the employee will not be protected by the FMLA.[11] The employer also must provide notice to its employee when the employee's leave is being designated as FMLA leave.[12] If an employer fails to notify the employee that the leave is being counted against his FMLA leave, the employee may be entitled to FMLA leave in addition to the time he has already taken, and may sue for violation of the FMLA if he is discharged for taking more than 12 weeks.[13]

Medical Certification

As protection for employers from abuse of the FMLA, the FMLA provides that an employer may require that leave be supported by medical certification.[14] Recently, the Seventh Circuit held that when a doctor's certification indicated that an employee's condition did not require him to miss work, the employer could deny the employee FMLA leave and did not have to request another certification when the employee made a subsequent request for leave.[15]

Adequate Reinstatement

The act requires that an employee, at the end of his FMLA leave, be returned to his former position or to an equivalent position.[16] As one might imagine, this aspect of the FMLA has resulted in a great deal of litigation. One certainty the case law has established is that this requirement does not give an employee greater rights than if he had not taken FMLA leave. That is, if the employer was going to be discharged or transferred prior to his leave, the FMLA does not offer protection against the discharge or transfer.[17] As for *when* an employee must be reinstated, a federal district court in Massachusetts recently ruled that the FMLA does not permit an employer to determine that an employee is not ready to return to work.[18] The employer must rely on the employee's medical certification and reinstate accordingly.

Who May Sue

The act permits "employees" to sue for interference with rights protected under the act.[19] Employers may not "interfere with, restrain, or deny the exercise of" any FMLA-protected right. At least one court has determined that the reference to "employee" includes prospective and former employees. The First Circuit held that an applicant, who alleged the company did not rehire him because he had taken FMLA leave when he previously worked for the company, could sue for a violation of the FMLA.[20]

Individual Liability

While no circuit courts have addressed this issue, the majority view in the federal district courts is that individual liability does exist under the FMLA.[21] The courts that have found individual liability have compared the definition of employer in the FMLA to that of the Fair Labor Standards Act, which provides individual liability.[22] The courts that have not found individual liability have compared the act to Title VII, which does not provide individual liability.[23]

Entitlement To A Jury Trial

The Sixth Circuit recently ruled that an FMLA plaintiff is entitled to a jury trial. The appellate court found that although the FMLA does not expressly provide for the right to a jury trial, the legislative history of the FMLA and the structure of the remedial provisions of the act reveal that Congress intended to create a right to a jury trial.[24]

The Future

Case law is not the only way the FMLA is evolving. Currently there are several bills pending in Congress that would expand coverage under the act to employers of 25 or more workers and also would grant leave to parents for school-related purposes.[25] Another FMLA-related bill is pending that is intended to clarify some parts of the act, such as the definition of a serious health condition.[26]

Regardless of whether that "clarification" occurs, however, in light of the many opportunities for litigation the FMLA seems to provide, employers must proceed with care when presented with an employee who may be eligible for FMLA leave by:

- making sure the employee has worked with the company for the requisite time to be eligible for leave;
- requesting medical certification as soon as possible, and perhaps requesting a second medical opinion if the employer has reason to doubt the validity of the certification;
- promptly notifying an employee that her leave is considered FMLA leave and documenting the information that is received from and sent to the employee; and
- educating the managers and supervisors who may be the first people to receive notice that an employee may be entitled to FMLA leave.

1. 29 U.S.C. §§ 2601-2654.

2. *An eligible employee is any employee who has worked for the company for at least 12 consecutive months and has worked at least 1,250 hours during the 12 months immediately preceding the date the leave would begin. 29 C.F.R. § 825.110(a)*.

3. 29 C.F.R. §§ 825.100(a) and 825.112(a).

4. *Keri Goldstein Unowsky*, *The FMLA at Five Years: The Courts Struggle to Define the Parameters*, 24 Employee Relations Law Journal 5 (1998).

5. 29 C.F.R. § 825.114.

6. Price v. City of Fort Wayne, 117 F.3d 1022 (7th Cir. 1997).

7. Hodgens v. General Dynamic Corp., 963 F. Supp. 102 (D. R.I. 1997); Brannon v. OshKosh B'Gosh, 897 F. Supp. 1028 (M.D. Tenn. 1995).

8. Thorson v. Gemini, 123 F.3d 1140 (8th Cir. 1997), *remanded to 998 F. Supp. 1034 (N.D. Iowa 1998)*.

9. Gudenkauf v. Stauffer Communications, Inc., 922 F. Supp. 465 (D. Kan. 1996).

10. Pendarvis v. Xerox Corp., 3 F. Supp.2d 53 (D. D.C. 1998).

11. Satterfield v. Wal-Mart Stores, 135 F.3d 973 (5th Cir. 1998); Carter v. Ford Motor Co., 121 F.3d 1146 (8th Cir. 1997); Gay v. Gilman Paper Co., 125 F.3d 1432 (11th Cir. 1997); McGraw v. Sears Roebuck & Co., __ F. Supp. 2d. __, 1198 WL 650896 (D. Minn. Sept. 18, 1998).

12. 29 C.F.R. § 825.208(b).

13. Cline v. Wal-Mart Stores, Inc., 144 F.3d 292 (4th Cir. 1998); Viereck v. City of Gloucester, 961 F. Supp. 703 (D. N.J. 1997); but see Cox v. Autozone, Inc., 990 F. Supp. 1369 (M.D. Ala. 1998).

14. 29 U.S.C.A. § 2613(a).

15. Stoops v. One Call Communications, Inc., 141 F.3d 309 (7th Cir. 1998).

16. 29 U.S.C.A. § 2614(a)(1).

17. Ilhardt v. Sara Lee Corp., 118 F.3d 1151 (7th Cir. 1997); Carrillo v. The National Council of the Churches of Christ, 976 F. Supp. 254 (S.D.N.Y. 1997); Patterson v. Alltel Information Services, Inc., 919 F. Supp. 500 (D. Me. 1996).

18. Albert .v Runyon, 6 F. Supp. 2d 57 (D. Mass. 1998).

19. 29 U.S.C.A. § 2617(a)(2); see also 29 U.S.C.A. § 2615(a)(1) *(an employer may not "interfere with, restrain, or deny the exercise of" any FMLA-protected right)*.

20. Duckworth v. Pratt & Whitney, Inc., *1998 WL 380903 (1st Cir. 1998)*.

21. Bryant v. Delbar Products, Inc*., 1998 WL 546382, *9 (M.D. Tenn. 1998) (listing cases finding individual liability)*.

22. *Id.*

23. Frizzell v. Southwest Motor Freight, Inc., 906 F. Supp. 441, 449 (E.D. Tenn. 1995).

24. Frizzell v. Southwest Motor Freight, 154 F.3d 641 (6th Cir.,1998).

25. H.R. 191, *105th Cong. (January 7, 1997)*. Note that Minnesota currently provides parental leave for school activities. Minn. Stat. § 181.9412.

26. H.R. 3751, 105th Cong. (April 29, 1998).

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