Understanding The Family and Medical Leave Act of 1993

SUPERVISOR PROGRAM

by

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I. PURPOSE

The Family and Medical Leave Act, or the "FMLA," of 1993 (29 U.S.C. § 2601, et seq.) was passed into law, becoming effective on August 5, 1993, for the purpose of allowing covered employees the time off from work they need in order to attend to the illness of a loved one or of themselves.

II. WHICH EMPLOYERS ARE COVERED?

The FMLA applies to any employer who employs 50 or more employees for at least 20 weeks in either the current or previous calendar year.

Public sector employers are covered by the FMLA regardless of the number of employees they employ.

III. WHICH EMPLOYEES ARE COVERED?

Employees are protected by the FMLA if they work for a covered employer ***and*** they:

a) Work within 75 miles of 50 or more other employees of the employer, which is determined at the time the employee requests the leave,

b) They have worked for their employer for at least 12 months within the last seven (7) years, which need not be consecutive, and

c) They have ***actually*** worked at least 1,250 hours in the preceding 12-month period prior to beginning their leave. (Sick time, vacation time or personal time off do not count towards this calculation.)

Consequently, the FMLA covers part-time as well as full-time employees.

Also, even though all public sector employers are automatically covered by the FMLA, all public employees are not automatically entitled to receive the benefits of the Act unless each of these requirements are met as well.

IV. MILITARY SERVICE COUNTS TOWARDS FMLA ELIGIBILITY

The final regulation state that the months in which an employee is deployed on a qualifying USERRA military leave will also count towards the employee's FMLA eligibility. 29 CFR § 825.110(b)(i).

An employee returning from USERRA-covered service must be credited with the hours of service that the employee ***would have worked*** if it had not been for the employee's military service. Accordingly, an employee who is reemployed following USERRA-covered service has the hours that he would have worked for the employer ***added to any hours actually worked*** during the previous 12-month period to meet the FMLA's hours of service requirement. In order to determine the hours that would have been worked during the time spent on military leave, the employee's pre-service work schedule can generally be used for calculations. 29 CFR § 825.110(c)(2).

V. WHEN CAN A COVERED EMPLOYEE GET TIME OFF FROM WORK?

Covered employees may receive up to 12 weeks of unpaid leave per any 12-month period due to:

a) The birth, adoption or receipt of a child into foster care,

b) A serious health condition that makes the employee unable to perform the essential functions of his/her position, or

c) A serious health condition wherein the employee is needed to care for a spouse, child or parent.

FMLA leave is also available for the placement of adopted children. The final regulations retain the proposed clarification that FMLA leave may include time to **"travel to another country to complete an adoption."** FMLA eligibility is not affected by the **"source of the adopted child."** 29 CFR § 825.121(a)(1).

Employees who become eligible for FMLA protection while in the middle of non-FMLA leave may automatically acquire FMLA protection. As a result, leave that begins before FMLA eligibility may start out as "non-FMLA" qualifying leave, but if an employee becomes eligible for FMLA leave in the midst of the absence, FMLA protections are triggered from that point forward. 29 CFR § 825.110(d).

VI. CALCULATING FMLA LEAVE HOURS

A. How Many Hours of FMLA Leave Is An Employee Eligible To Receive?

The FMLA does not state how many hours or days of leave an employee is allowed to use under the FMLA. Instead, the FMLA, employees are entitled to receive 12 weeks of leave for covered conditions.

Therefore, in order to calculate number of hours an employee would be entitled to take under the FMLA, employers need to look at the number of hours that employee would normally work in a given week.

If an employee normally works 40 hours in a given week, that employee would be entitled to receive 480 hours of FMLA time in a given year.

Likewise, if an employee normally works only 30 hours in a given week, that employee would be entitled to receive 360 hours of FMLA time in a given year.

If an employee's schedule varies from week to week to such an extent that an employer is unable to determine with any certainty how many hours the employee would otherwise have worked if he was not on leave, a weekly average of the hours scheduled over the 12 months prior to the beginning of the leave period (including any hours for which the employee took leave of any type) would be used for calculating the employee's leave entitlement.

B. Mandatory Overtime Hours And FMLA Hours of Eligible Leave

If an employee would normally be required to work overtime, but is unable to do so because of an FMLA-qualifying reason that limits the employee's ability to work overtime, the hours which the employee would have been required to work may be counted against the employee's FMLA entitlement. Such issues arise when an employee is using FMLA intermittent or reduced schedule leave.

For example, suppose and employee would normally be required to work 48 hours in a particular week. However, due to an FMLA serious health condition the employee is unable to work more than 40 hours. That employee would be able to use eight hours of FMLA-protected leave out of the **48-hour workweek**, or one-sixth (1/6) of a week of FMLA leave.

Therefore, the employee’s allotted time off would not be calculated on a 40 hour work week but instead on a 48 hour work week.

However, voluntary overtime hours do not count towards this calculation. Only mandatory overtime counts.

Of course, these mandatory overtime hours do not matter when an employee misses an entire week. One week is equal to one week, regardless of the number of hours worked.

VII. LEAVE NEED NOT BE PAID; EMPLOYEES MAY BE REQUIRED TO USE ACCRUED TIME OFF

Although the Act does not require that FMLA leave be paid by the employer, employers may require in their policies that employees off on leave, including FMLA leave, use their accrued time off accounts while they are off from work. (i.e., sick time, vacation time, etc.).

VIII. EMPLOYERS MAY REQUIRE FMLA LEAVE AND OTHER LEAVES TO RUN CONCURRENTLY

Employers may also state in their policies that an employee's paid time off and the employee's FMLA leave run concurrently with each other and not in succession. As a result, an employee would not be eligible to take 12 weeks of FMLA leave, return to work, and then use his vacation account to take even more time off from work.

Employers may also require employees' FMLA leave to run concurrently with short-term or long-term disability and Workers' Compensation leave. However, employers should first clearly reserve all such rights in their policies before imposing such requirements against employees.

If an employer does not state that FMLA leave runs concurrently with other leaves, the presumption under the law is that they will run consecutively.

IX. WHAT IS A "SERIOUS HEALTH CONDITION"?

The FMLA defines a "serious health condition" as being whenever a covered individual:

1. Undergoes treatment or experiences a period of incapacity that requires inpatient care in a hospital, hospice or residential medical care facility, or any subsequent treatments stemming from this inpatient care, or

2. Requires continuing treatment under the care of a health care provider which results in the person being incapacitated for more than three consecutive calendar days, as well as any subsequent treatments or periods of incapacity that relate to the same condition which also involves:

    a. At least **two treatments** under the direct supervision of a health care provider, nurse or physician's assistant, or by a provider of health care services (i.e., physical therapist) under the direction of a health care provider within a **30-day period** and within **seven days of the onset of the leave**, or

b. A single treatment by a health care provider that results in a continuing regimen of treatment under the supervision of a health care provider, or

3. Any period of incapacity due to pregnancy or prenatal care, or

4. Any period of treatment or incapacity due to a chronic serious health condition which:

   a. Requires periodic visits of at least **two times each year** for treatment by a health care provider, or by a nurse or physician's assistant under the direct supervision of a health care provider (29 CFR § 825.115(c)(1)),

   b. Continues over an extended period of time, and

   c. May cause episodic rather than a continuing period of incapacity (i.e., asthma, diabetes, epilepsy, etc.).

5. A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective, as in the case of a stroke, Alzheimer's, or the terminal stages of a disease. The person must still be under the continuing supervision by a health care provider, but she need not be receiving active treatment, or

6. Any period of absence to receive multiple treatments under the care or referral by a health care provider for restorative surgery after an accident or other injury, or for a condition that would likely result in an absence of more than three consecutive calendar days if such treatment was not provided, as in the case of chemotherapy for cancer, physical therapy for severe arthritis and dialysis for kidney disease.

X. WHAT IS ***NOT*** A SERIOUS HEALTH CONDITION?

Although it may not seem like it, not everything qualifies as a “serious health condition” under the FMLA.

First, treatments that are cosmetic or are not medically necessary are not covered by the FMLA, unless an inpatient hospital stay is required.

Unless an individual’s health condition has serious complications, a "serious health condition" does not include:

1. Common cold or the flu,

2. Earaches,

3. Upset stomach or minor ulcers,

4. Headaches (other than migraines), or

5. Routine dental or orthodontia problems.

"Treatment" by a health care provider does not include routine appointments, such as for:

1. Physical examinations,
2. Hearing examinations,
3. Eye examinations, or
4. Dental examinations.

"Regimen of continuing treatment" does not include activities that can be initiated without a visit to a health care professional, which include:

1. Over-the-counter medications (i.e., aspirin or salves),
2. Bed rest,
3. Drinking fluids, or
4. Exercise and the like.

Also, treatments that can be initiated by individuals without the assistance of a health care professional, such as with over-the-counter medications, exercise, rest or by drinking fluids, do not qualify as a "regimen of continuing treatment" under the Act.

Although an individual may qualify for FMLA leave when referred by a health care provider to receive **treatment** for substance abuse, FMLA leave is not available when the individual is simply unable to come to work due to such abuse. Therefore, individuals may qualify for FMLA coverage when they receive treatment for a chemical dependency condition, not for the abuse of a substance.

XI. WHEN IS AN EMPLOYEE NEEDED TO CARE FOR A COVERED FAMILY MEMBER?

In Willard v. Ingram Construction Co., Inc., 194 F.3d 1315 (6th Cir. 1999), the plaintiff, an employee covered by the FMLA, was terminated from his job after taking a leave of absence to care for his premature baby and girlfriend. The plaintiff contended that he was needed to care for his girlfriend, so he was protected by the FMLA. The plaintiff also claimed that his baby was in the hospital and he had other children to care for as well since his girlfriend was incapacitated.

The employer claimed that the FMLA did not cover girlfriends, even if an employee has a child with her.

The employer also contended that the employee was not needed to care for his premature infant child since the baby was in the hospital. The hospital could do that.

And finally, the employer argued that the FMLA does not allow time off to care for the other children in the family who may need attention when a new child is born.

The court agreed with the employer regarding the status of the employee's girlfriend, holding that the plaintiff was not entitled to any leave to care for her since she was not legally his wife.

However, the court disagreed with the employer on its other arguments.

The court held that even when a child is hospitalized, a parent might be needed to care for that infant. The court also held that it is quite likely that when a child is born, the new parent will need time off from work to care for the other children in the family as well.

The court therefore held for the plaintiff on these last two issues.

NOTE: It is important to understand that various courts have held that emotional and psychological support may qualify as "necessary care" when covered family members are hospitalized.

XII. FMLA COVERS TIME OFF FOR "PSYCHOLOGICAL COMFORT"

In Scamihorn v. General Truck Drivers, Office, Food and Warehouse Union, 282 F.3d 1078 (9th Cir. 2002), Scamihorn was an employee of General Truck Drivers when he took a leave of absence to care for his father. Scamihorn took a leave under the FMLA, but his employer later terminated Scamihorn, claiming that he was not really needed "to care for" his father. Scamihorn claimed that his termination was illegal under the FMLA.

Scamihorn's father suffered from and took medication for depression, which was brought about by the murder of his daughter. As a result, Scamihorn's father functioned at about 65% of his normal capacity. He generally continued working, stating that "work was part of my salvation," but took some time off and was assisted at other times by his wife. Scamihorn spent several hours each day talking with his father about his sister's death, and sometimes drove his father to therapy when his father was too emotionally distraught to drive. He also performed various chores on an intermittent basis as needed.

The FMLA does not define what it means to "care for" a family member. The regulations, however, state that "[i]t includes situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor, etc. The term also includes providing

psychological comfort and reassurance which would be beneficial to a seriously ill child or parent receiving inpatient care." 29 CFR Section 825.116(a) (1993).

The final regulations clarify that "care" includes the provision of psychological comfort to those "receiving impatient or home care." 29 CFR Section 825.116(a) (1995). Noting that "[t]he legislative history of the FMLA underscores the significance of this type of care [S. Rep. No. 103-3 at 24 (1993)]," the court concluded that "the regulations specifically contemplate situations that encompass both physical and psychological care for a family member." The court therefore concluded that Scamihorn was in fact needed to "care for" his father within the meaning of the FMLA.

XIII. SELF-INFLICTED WOUNDS ARE COVERED BY THE FMLA

In Chandler v. Specialty Tires of America, 283 F.3d 818 (6th Cir. 2002), Heather Chandler was employed as an administrative assistant by Specialty Tires of America in Tennessee. On May 17, 1998, she attempted suicide by taking an overdose of pills. That evening, Chandler's parents found her and rushed her to the hospital. On May 18, she was transferred to another hospital so that she could be treated by psychiatrists.

During the week she was hospitalized, Chandler kept in close contact with the plant manager, Joe McNeer. She told him about her suicide attempt and that she needed time off for medical treatment. He agreed to place her on paid leave. By the end of the week, she felt better and was planning to return to work the following week.

Robert Beck, Specialty Tire's personnel manager and Chandler's immediate supervisor, learned of her suicide attempt on May 19. Believing that her behavior demonstrated a lack of responsibility, he concluded that he could no longer trust her to handle her duties as his administrative assistant. Following an eight-minute conversation with McNeer, Beck decided to fire Chandler without making any inquiries into her request for leave. He admitted that he had no experience with the FMLA when he fired her. He claimed, however, that he based his decision entirely on what he characterized as her irresponsible act of taking an overdose of pills.

Chandler sued Specialty Tires claiming that she was wrongfully fired in violation of the FMLA. The court found for Chandler and awarded her $36,652.00 in damages and $47,320.00 in attorneys' fees and costs. Specialty Tires appealed to the Sixth U.S. Circuit Court of Appeals, which covers Kentucky, Ohio, Michigan and Tennessee.

The Sixth Circuit FMLA held that hospitalization after a suicide attempt qualifies as a serious medical condition. The court also held that Chandler's notification of her condition was adequate to preserve her FMLA rights.

The court reasoned that an employee need not mention the FMLA when taking leave. All he must do is notify his employer that leave is needed. It is the

employer's responsibility to identify the leave as qualifying for FMLA protection. The employer is then required to restore the employee to his previous position or an equivalent position when he returns from FMLA leave. The Act also prohibits employers from interfering with, restraining, or denying the exercise or attempted exercise of any FMLA right. That prohibition includes retaliatory discharge for taking FMLA leave.

Specialty Tire argued that Chandler wasn't fired for exercising her FMLA rights. It argued that Beck never considered the cause of her suicide attempt or the fact that it might result in her absence from work. The company claimed that the supervisor considered "only the *act* of overdosing, itself," which isn't protected activity under the FMLA.

The Sixth Circuit acknowledged that the FMLA protects an employee from termination as a result of taking leave for a serious medical condition **but doesn't protect an employee from a termination motivated by the underlying medical condition.** (Beware of the Americans with Disabilities Act!!!) The court concluded, however, that there was evidence that supported the jury's verdict that Beck fired Chandler for taking FMLA leave rather than for taking an overdose of drugs or being diagnosed with severe depression.

The court relied on the following undisputed facts:

- Beck knew that **Chandler** was on medical leave;
- He knew that she had been hospitalized for a suicide attempt;
- He decided to fire her shortly after an eight-minute conversation during which he learned that she was hospitalized;
- The timing of her termination coincided with the end of her period of leave; and
- Beck didn't realize that she was qualified for leave under the FMLA.

XIV. WHEN IS AN EMPLOYER ON NOTICE OF AN FMLA CONDITION?

A. Employer Is On Notice Of Serious Health Condition Once Employer Is "Reasonably Aware" Of An FMLA Qualifying Event

If an employer should have been **reasonably aware** that an employee's absence from work may be covered by the FMLA, then the employer must send a notice to the employee informing the employee that he qualifies for FMLA coverage. Recent interpretations by the courts and Wage and Hour have weighed this "reasonably aware" standard **very much** into the favor of employees.

In Vargo-Adams v. U.S. Postal Service, WL 59349, N.D. OH 1998, an employee who suffered from migraines was terminated because she was unable to maintain a regular work schedule. The employee claimed her termination violated the FMLA since she should have been granted an intermittent work schedule for the days she missed.

The employer argued that migraines were not covered by the FMLA because she had not seen a physician regarding this condition. The employer also argued that it was never informed that the employee was missing work due to this condition.

However, the employee was able to prove that she had seen her physician six times to receive treatment for these migraines. The employee further claimed that she called off each time she had a migraine telling her supervisor that she had a headache and would not be in to work.

The court agreed with the employee. The court held that the employee had a serious medical condition, that she received treatment from a healthcare provider and that she gave her employer notice of this illness by telling her supervisor that she suffered from "headaches." With such a pattern of illnesses, the employer should have inquired further regarding the employee's condition.

B. Prolonged Absence May Constitute Notice To Employer

In those cases where an employee misses several days from work, the courts have tended to find that this constitutes reasonable notice to the employer that a serious health condition may be the reason for the absence. Therefore, in reality, if it is remotely reasonable to believe that the employee has incurred a qualifying event, the employer has a duty to investigate to the best of its ability and determine whether an FMLA qualifying event has occurred.

C. What If An Employer Could *Not* Have Reasonably Been Aware Of the Employee's Serious Health Condition?

If the employer could not have reasonably known that the leave an employee has been taking would qualify as FMLA leave, the employer may retroactively designate the employee's leave period as qualifying under the FMLA if the employer does so within five (5) business days of realizing that the employee's leave does in fact qualify for coverage under the FMLA.

D. Employee Who Conceals Serious Health Condition

In Carter v. Ford Motor Co., No. 96-3668, CA 8, 1997, an employee had his wife call him off from work by telling his employer that he had family problems. Two days later, he was diagnosed with anxiety and depression. The employee called his employer back six days later and reported that he was still sick. A few days later, he called off again saying he was still sick.

The company then sent the employee a letter telling him to either report to work or provide a reason for his absence. The employee's wife called the company about a week later and said she was coming in with her husband's medical papers. However, the company said to not bother since her husband had been terminated.

The employee claimed he was terminated in violation of the FMLA. The court disagreed.

The court reasoned that the FMLA specifically requires employees to give their employers notice of their leave "as soon as practicable," which the court reasoned should be within two days. Since the employee never gave the employer adequate notice of his leave, the termination was legal.

E. Waiting For Medical Certification

An employer may also wait to classify an employee's leave as being covered by the FMLA by sending the employee a "Designation Notice" if the employer is waiting for medical certification. Upon receiving this medical certification, the employer has **five (5) business** days in which to retroactively designate the leave as covered by the FMLA.

However, as soon as an employer is given "reasonable" notice that an event or condition "may" be covered by the FMLA, the employer has **five (5) business** to provide the employee with an "Eligibility Notice" and a "Rights and Responsibilities" notice.

All of these employer notices will be discussed in these materials.

XV. NOTICE REQUIREMENTS PLACED UPON EMPLOYEES

A. 30 Day Notice Is Required When Leave Is Foreseeable

If an employee's leave is foreseeable, then the employee must give the employer a 30 day notice of the impending leave, or as much as is practicable.

B. Employee Must Identify Leave As FMLA

It is the employer's obligation to designate an employee's qualifying leave as being FMLA leave once an employee makes the employer "reasonably aware" that the employee has a "serious health condition."

In a new development, the final regulations note the general rule that an employee need not mention the FMLA by name, but limit this freedom to circumstances "[w]hen an employee seeks leave for the first time for an FMLA qualifying reason." However, once FMLA leave has been granted for an employee's health condition, the employee must thereafter **"specifically reference either the qualifying reason or the need for FMLA leave."** 29 CFR § 825.303(b).

The final regulations expressly clarify that an employee cannot merely call in "sick" and thereby trigger an affirmative duty for the employer to inquire further about whether the absence might be FMLA-qualifying. 29 CFR § 825.303(b).

The final regulations specify that even for unforeseeable leaves, it should be "practicable" for employees to request leave "either the same day or the next business day." 29 CFR § 825.302(b).

C. Employer's Usual and Customary Procedures

Under the original FMLA regulations, employees were expected to report their need for FMLA leave "as soon as practicable" if they couldn't provide notice 30 days before they needed to miss work. The old regulations included interpretive examples and suggested that employees had ***up to two days*** to call in if they were out for FMLA protected reasons.

However, the new final regulations first say that "[w]hen an employee seeks leave for the ***first time*** for an FMLA qualifying reason," the employee need not mention the FMLA by name. However, once FMLA leave has been granted for an employee's health condition, the employee must thereafter **"specifically reference either the qualifying reason or the need for FMLA leave."** 29 CFR § 825.303(b).

The final regulations expressly state that an employee cannot merely call in "sick" and thereby trigger an affirmative duty for the employer to inquire further about whether the absence might be FMLA-qualifying. 29 CFR § 825.303(b).

Additionally, the final regulations specify that even when a leave is unforeseeable, it should be "practicable" for employees to request leave "either the same day or the next business day." 29 CFR § 825.302(b).

Also under the final regulations, when the need for leave is not foreseeable, an employee must comply with the employer's ***usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances.***

Specifically, the new regulations generally permit employers to require employees to follow established call-in procedures (except ones that impose more stringent timing requirements than the regulations provide), and they provide that failure to properly notify employers of absences may cause a delay or denial of FMLA protections. 29 CFR § 825.302(d).

Employers may require employees seeking FMLA leave to call a "**designated number or a specific individual to request leave."** 29 CFR § 825.303(c). Under the previous 1995 regulations, an employer could not delay or deny FMLA leave if an employee failed to follow such procedures.

After these new regulations were adopted, many employers rejoiced, assuming they could safely discharge employees who didn't show up and didn't call in.

However, in Randolph v. Grange Mutual Casualty Company, No. 09-AP-519, 10th District Court of Appeals of Ohio (Franklin County 12/22/09), James Randolph worked for Grange Mutual Casualty and had an absenteeism problem. He was placed on probation and warned that if he had one more unauthorized absence, he would face termination.

The company had a call-in rule that required employees who needed to miss a scheduled workday to call off within 30 minutes of their scheduled work time.

Randolph suffered from a form of depression and was allowed to take intermittent FMLA leave for such things as medication checks and treatment.

Randolph claimed that one evening before a scheduled workday, he went into a dark depression and "blacked out" until he awoke the next day at 3:00 p.m., having missed his workday. He then headed for his doctor's office and decided to check his voice mail before calling his supervisor.

The supervisor had already fired Randolph after not hearing from him by the 30-minute deadline. That termination was by voice mail, which Randolph retrieved on his way to the doctor. Randolph said the news worsened his condition so much that he drove straight to his mother's house, crying. He never made it to the doctor.

His mother then called in for him about 11:00 p.m., explaining that her son was having a "nervous breakdown."

Randolph phoned the supervisor at 7:15 a.m. the next morning. However, Grange would not reconsider Randolph's termination.

Randolph sued, alleging that he had called in as "soon as practical."

The company argued that the new regulations allowed it to insist that Randolph follow the company's call-off rules.

But the court said that Randolph's suit deserved a trial. It concluded Randolph had no way of knowing that he would black out, was shocked when he learned he had been terminated and then tried to notify his employer via his mother. That, said the court, could be seen as prompt notice under both the old and the new regulations.

XVI. EMPLOYEE JOB PROTECTION

A. Same Or Equivalent Position

Aside from those key employees who have received proper notification, employees returning from FMLA leave must be restored to their same or an equivalent position, absent special circumstances. This includes equivalent wages, benefits and terms and conditions of employment.

Even if an employee accepts a light duty assignment instead of taking FMLA leave, the employee is still entitled to be restored to his former position, or to an equivalent one at the end of his FMLA.

However, if the employer can show that the employee did not receive her job back due to some reason that is independent of her FMLA leave, such as a layoff or shut down, then no violation will exist. Employees on FMLA leave have no greater rights than those not on FMLA leave.

Of course, if an employee on FMLA leave is laid off or terminated while on leave, then such an occurrence would alleviate the effected employee's restoration rights.

XVII. INTERMITTENT AND REDUCED SCHEDULE LEAVES

A. Intermittent Leave

An **"intermittent leave"** occurs when an employee takes FMLA leave in certain blocks or intervals of time, such as when the employee takes a week off from work every so often, or a day, or a few hours, or so on. However, such leaves occur on an "irregular" or intermittent basis as the employee needs this time off from work.

The final regulations clarify that an employee **"must make a reasonable effort"** to schedule treatments so as not to **"disrupt unduly"** the employer's operations. 29 CFR § 825.203.

B. Reduced Schedule Leave

A **"reduced schedule leave"** occurs when an employee basically works a shortened daily or weekly work schedule, such as by only working five hours a day, three days a week, etc. A reduced schedule leave may also require an employee to take a few hours off from work each week or each day on a regular basis.

C. Intermittent Leave Schedule and Reduced Schedule Leave Must Be Medically Required

Employees may opt to take either an intermittent leave or they may opt to work on a reduced schedule whenever such a leave is medically required. Therefore, covered employees do not need their employer's permission regarding which type of leave they will be taking when such a leave is necessitated for medical reasons.

However, if an employee does not have a medical condition that requires him to take an intermittent or reduced schedule leave, then the employer will not be required to allow the employee to take such time off. Still, the employee may obtain either an intermittent or reduced schedule leave if the employer consents, such as in the case of the birth, adoption or the taking of a child into foster care.

D. FMLA Time Off Must Be Tracked In The Smallest Increments The Employer's Policies Allow

Employers must provide covered employees with such leaves and then track this time off in the smallest increments their policies allow.

For instance, if an employer tracks sick time in one hour increments, then the employer must track both intermittent and reduced schedule leaves in

one hour increments in order to determine when the employee has exhausted his twelve weeks of FMLA leave.

E. Temporary Transfer Is Allowed

If the employee needs to take this time off from work on an intermittent or reduced schedule basis, then the FMLA allows the employer to temporarily transfer the employee to another position of equal pay and benefits for as long as the employee's intermittent or reduced schedule continues.

F. Employee's Treatments Must Be After Hours, If Possible

Also, in order to accommodate the scheduling of the employee's work, the Act permits employers to require the employee to schedule his medical appointments or treatments before or after work hours in order to avoid a conflict with the company's work demands, if the health care provider agrees.

Employees are required to cooperate with their employer and make a reasonable effort to schedule their medical treatments so as not to unduly disrupt the employer's operations, subject to the approval of the health care provider.

For instance, if an employee requests every Tuesday afternoon off from work to go to an appointment with a health care provider, but these appointments may just as easily be scheduled after the employee's workday ends, then the appointment which does not conflict with the employee's work schedule must be taken.

XVIII. OTHER EMPLOYEE RIGHTS

A. Discipline For Absenteeism and FMLA Leave

1. Employees on FMLA leave may not be penalized.

Under the FMLA, employees may not be penalized for missing work due to a qualifying event. As a result, employers are not permitted to discipline their employees for missing work under the FMLA.

Even if the employer has an attendance policy that allows employees to only miss a certain number of days from work throughout the year, FMLA absences may not be included in these totals. **Absences that are due to an FMLA qualifying event may not be counted against employees as far as any attendance disciplinary systems are concerned**.

Of course, employees may still be required to follow an employer's procedures when reporting off from work.

However, if an employee does not indicate that she is taking FMLA leave, and the employer **could not have reasonably known** that such leave was covered by the FMLA, the employee may then be subject to the employer's disciplinary policy for excessive absenteeism if too much work is missed. Therefore, it is in the employee's best interest to clarify with the employer the reason for the time that was missed so that the employer might accurately classify this time as being covered by the FMLA in order to be protected from disciplinary action for excessive absenteeism.

Of course, again, the employer has a duty to investigate such situations in order to determine if an FMLA protected situation exists. Employees are not expected to request FMLA leave or to even recognize such an event when it occurs. Instead, they are expected to be truthful with their employers and explain the circumstances of their absences.

2. FMLA absences and performance reviews.

Similarly, an employee's FMLA absences cannot be used against an employee as part of the performance review process.

XIX. RETALIATION

A. Burlington Northern's Definition Of "Materially Adverse Employment Action" Applies To FMLA Retaliation Cases

In Millea v. Metro-North RR Co., No. 10-409 (2nd Cir. 08/08/2011), Christopher Millea suffered from severe post-traumatic stress disorder as a result of combat as a Marine during the First Gulf War. In 2001, Millea began working for Metro–North, a tri-state area commuter railroad. In 2005, he applied for special leave under the FMLA. Metro–North approved his application and granted him 60 days of intermittent FMLA leave for 2006.

In the summer of 2006, Millea was working in a Stamford storeroom under supervisor Earl Vaughn, with whom Millea had developed a contentious relationship. A phone conversation with Vaughn on September 18, 2006 developed into a heated disagreement that triggered one of Millea's panic attacks. Millea immediately left work to see his doctor. Because the encounter with Vaughn led to the attack, Millea did not inform Vaughn about his unforeseen FMLA leave. Instead, he advised Garrett Sullivan, the Lead Clerk, and asked Sullivan to advise Vaughn, which Sullivan did. The next day, Millea called Sullivan at 5:45 am to report that he was taking another FMLA day. Sullivan again relayed the information to Vaughn. In both instances, Vaughn received timely, although indirect, notice of Millea's use of FMLA leave.

Metro–North's internal leave policy states:

> **"[i]f the need for FMLA leave is not foreseeable, employees must give notice to their supervisor as soon as possible."**

Because Millea did not notify Vaughn of his two absences directly, Vaughn told Metro–North's payroll department to log Millea's absences as non-FMLA leave. Metro-North then opened an official investigation of Millea, which resulted in a formal "Notice of Discipline" being placed in his employment file for one year. The Notice was expunged after a year, Millea having had no further disciplinary incidents. After the investigation, Millea voluntarily transferred to a custodian janitorial job, which paid slightly less but was not supervised by Vaughn.

Millea then filed suit against Metro-North. Millea claimed that he never violated Metro-North's internal leave policy because he notified Vaughn indirectly of his absences, or, in the alternative, that the aspect of Metro-North's policy he violated was void because it conflicted with the regulations implementing the FMLA.

Millea alleged the following claims:

- Interference with Millea's ability to take FMLA leave. See 29 U.S.C. § 2615(a)(1) ("It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.").

- Retaliation against Millea for taking FMLA leave by: (i) placing a notice of discipline in his employment file for a year; (ii) requiring him to update his FMLA certification; (iii) creating a work environment that motivated him to transfer to a lower paying job; (iv) delaying approval of his bid for the lead custodian position in 2009; and (v) subjecting him to heightened managerial surveillance. See 29 U.S.C. § 2615(a)(2) ("It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.").

On the interference claim, the Second Circuit Court of Appeals found for Millea. The court reasoned that there is no dispute that a company may discipline an employee for violating its internal leave policy as long as that policy is consistent with the law; however, we conclude that, on these facts, Metro-North's internal leave policy is inconsistent with the FMLA.

The FMLA generally requires employees to "comply with the employer's usual and customary notice and procedural requirements for requesting leave." 29 C.F.R. § 825.303(c). **However, this requirement is relaxed in**

"unusual circumstances" or where the company policy conflicts with the law. Id.

The regulations implementing the FMLA provide that when an employee's need for FMLA leave is unforeseeable (as Millea's was), "[n]otice may be given by the employee's spokesperson (e.g., spouse, adult family member, or other responsible party) if the employee is unable to do so personally." Id. § 825.303(a). Because this regulation expressly condones indirect notification when the employee is unable to notify directly, Metro-North's policy conflicts with the FMLA and is therefore invalid to the extent it requires direct notification even when the FMLA leave is unforeseen and direct notification is not an option.

Whether Millea's situation on September 2006 constituted an "unusual circumstance" in which he was "unable" to personally notify Vaughn is a question of fact, not of law. The jury found that Millea gave proper notice, meaning his notice complied with the FMLA and all legally valid aspects of Metro-North's internal leave policy.

As for Millea's retaliation charge, Millea sought to define "retaliation" under the FMLA using the definition of "materially adverse employment action" articulated by the Supreme Court in the Title VII lawsuit, Burlington Northern & Santa Fe Railroad Co. v. White, 548 U.S. 53, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006). In particular, Millea proposed that an adverse employment action occurs when "a reasonable employee in the plaintiff's position would have found the alleged retaliatory action materially adverse," and that a retaliatory action is "materially adverse" **when the action "would have been likely to dissuade or deter a reasonable worker in the plaintiff's position from exercising his legal rights."**

Burlington Northern expanded the definition of "materially adverse employment action" for purposes of Title VII retaliation claims. Today, a Title VII plaintiff "must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." The Court rejected the proposition that an act of retaliation must relate to the specific terms and conditions of the employee's employment.

The Second Circuit reasoned that this same rationale applies to the anti-retaliation provision of the FMLA. The FMLA's anti-retaliation provision has the same underlying purpose as Title VII-and is almost identical wording.

Therefore, the court held that under the FMLA's anti-retaliation provision, a materially adverse action is any action by the employer that is likely to

dissuade a reasonable worker in the plaintiff's position from exercising his legal rights.

Consequently, a "material adverse action" is restricted solely to changes in the employee's terms and conditions of employment, the district court committed legal error.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

In short, the standard for employees to meet into order to prove FMLA retaliation just got a lot lower. Rather than having to prove that the employer took some action against some tangible aspect of their job, all employees have to prove today is that the employer has created a working environment that is:

"… likely to dissuade or deter a reasonable worker in the plaintiff's position from exercising his legal rights."

Unfortunately for employers, this is a question of fact to be determined by a jury.

Therefore, again, HR professionals must make sure that their managers and supervisors are able to document why they are taking the actions they are against employees as well as being aware of what type of environment they are creating in the workplace. This area of "retaliation law" is just another example of where good old HR practices will do much to prevent lawsuits.

XX. WAIVER OF RIGHTS

The 1995 regulations indicated that "[e]mployees cannot waive, nor may employers induce employees to waive, their rights under FMLA." Some courts had construed this language as prohibiting settlement agreements and other retroactive waivers without DOL or court approval.

The final regulations insert the word "**prospective**" before the word "**rights**," and include an express provision permitting **"the settlement or release of FMLA claims by employees based on past employer conduct without the approval of the Department of Labor or a court."** 29 CFR § 825.220(d).

XXI. LIABILITIES AND DAMAGES

A. Managers Can Be Held Personally Liable

In Carpenter v. Refrigeration Sales Corp., *et al.*, 49 F. Supp.2d. 1028 (N.D. Ohio 1999), since 1990, the plaintiff reported to William Wagner and had received excellent reviews on her work. She was later offered a promotion to the account receivable position.

However, on April 7, 1997, she was diagnosed with hepatitis and needed to have the rest of the week off. When she told Wagner, he told the plaintiff that she was no longer eligible for the account receivable promotion.

On April 11, 1997, Wagner terminated the plaintiff's employment. The plaintiff sued both her employer and Wagner personally. The court allowed both claims to stand and granted summary judgment for the plaintiff.

Specifically, the court held that:

1. The plaintiff was eligible for FMLA leave,

2. The defendant was a covered employer,

3. The plaintiff suffered from a serious health condition,

4. The plaintiff provided her employer with adequate notice of her condition and

5. The employer never requested a medical certification.

The court also held that it was following the majority of federal courts that have allowed plaintiffs to hold their supervisors and managers personally liable under the FMLA.

B. Enforcement and Remedies

Enforcement provisions of the FMLA are adopted from the enforcement procedures under the Fair Labor Standards Act and are initiated by an administrative charge filed by the employee. Like the FLSA, the FMLA is enforced by the Wage and Hour Division of the U.S. Department of Labor.

Also like the FLSA, the statute of limitations for filing a FMLA charge is two years, unless the violation was willful, in which case the statute of limitations is three years.

Like Title VII, employees are protected for exercising their rights under the FMLA from any retaliatory acts that may be committed by their employer.

Additionally, § 2617 of the FMLA allows employees to pursue a private civil suit against employers who violate the Act. The Secretary of Labor is also empowered to file civil suits against an offending employer. Further, again like the FLSA, individuals may be held personally liable under the FMLA.

Employers and individuals who violate employees' rights under the FMLA may be ordered to pay monetary damages and equitable relief, which may include the employee's lost wages, "double" or liquidated damages, and the costs and attorneys' fees associated with enforcing these rights. Employers may also be ordered to reinstate and or promote such employees, depending on the circumstances of the cases.

XXII. COMPLYING WITH THE FMLA

A. FMLA Employer Checklist

In general, in order to properly manage the FMLA, employers should consider adopting the following practices:

1. Display the FMLA Notice Poster in a conspicuous location, which may be obtained from the Department of Labor, Wage and Hour Division.

2. The employer's handbook should describe the rights afforded to employees under the FMLA, their responsibilities and what benefits they are entitled to receive under the Act. Alternatively, employers may distribute an FMLA fact sheet to employees that contains the same type of information. These materials should provide employees with such information as:

    a) They are entitled to receive up to 12 weeks of FMLA leave each year and on what basis this leave may be used (i.e., in one lump period of time, intermittently or on a reduced schedule basis, etc.),

    b) How their 12-month period of calculating FMLA leave will be made (i.e., rolling twelve month period, calendar year, etc.),

    c) Whether employees will be required to provide a medical certification of their condition, or of a covered family member, if applicable, and the consequences of not providing such documentation to the employer (i.e., non-certification of the employee's condition),

    d) Whether the employer will require its employees to use their paid time off while on FMLA leave, as well as whether any conditions may be placed upon the employees for using their paid time off while on FMLA leave, and if the FMLA leave will run concurrently with any other paid leave taken,

    e) Whether employees will be required to make premium payments for their benefits, including their health care coverage, while on unpaid FMLA leave, where the employee is expected to send these payments, when such payments are due and the consequences for missing any premium payments. (The amount of these payments should also be included in the FMLA Designation and/or Eligibility Notice.)

    f) Whether a return-to-work, or a fit-for-duty, certificate will be required from the employee before being permitted to return to work, and the consequences of not providing one,

g) Who qualifies as a key employee and what the potential consequences are of being classified as a key employee, and

Note: If the employee qualifies as a "key" employee and will be denied restoration rights by the employer, the employee must also be informed of this in writing and given a reasonable amount of time to return to work after receiving such notice.

h) What restoration rights employees have regarding their jobs.

3. Employees should be required to contact their employer on a reasonable and periodic basis in order to keep the employer informed of their return-to-work status.

4. Employers should also reserve the right to have their employees' recertify their serious medical conditions on a **reasonable basis**, but no more frequently than once every 31 days, or sooner if any information regarding the covered individual's serious medical condition changes in any way.

5. If medical certification or return-to-duty certificate is required, the employee must receive written notice of this fact with every correspondence from the employer, unless the initial notice to the employee ***and*** the employer's handbook, or other written document, has already informed the employee of such requirements.

6. If the employer desires to have its health care provider contact the employee's health care provider, the employee should be sked to sign a consent form and a HIPAA Release form.

7. If the employer intends to cancel the employee's health insurance coverage due to the employee's failure to make timely payments, the employee must be informed of this fact in writing at least 15 days **before** such coverage is terminated.

8. Employers must also adopt and follow confidentiality measures in order to ensure that the medical conditions of their employees remain private.

9. Managers should be trained in what types of conditions may qualify for FMLA coverage, they should be trained to send employees they suspect of being covered by the FMLA to the Human Resource Department for authorization and certification. They should also be instructed to keep such information as an employee's serious health conditions private. Only those who are on a need-to-know basis should be privy to such information.

10. Employers may require that a second and even a third medical opinion be rendered when such opinions conflict. One of the best

ways to manage the FMLA is to ensure that any employee's potentially serious health condition is certified as such by a health care provider.

11. Notices should be sent to employees by way of "proof of mailing" or by some method of tracking as proof that proper notices have been provided. If the employer fails to provide any of these notices, the lack of notice will fall to the employee's favor and protection under the FMLA.

12. Human Resource Departments should maintain a standardized collection of the FMLA forms needed to remain in compliance. These forms may then be customized to fit each employee's situation, then sent to the employee in an efficient manner. A list of some of the forms employers should have ready to implement, as previously discussed, are:

    a. General notice

    b. Eligibility notice

    c. Rights and responsibilities notice

    d. Designation notice

    e. Employee's Request for FMLA Leave,

    f. Medical Certification Form,

    g. Permission from Employee to Contact Health Care Provider,

    h. Notice of Termination of Health Insurance Coverage, and

    i. Key Employee Denial of Job Restoration Letter.

Notice: Legal Advice Disclaimer

The purpose of these materials is not to act as legal advice but is intended to provide human resource professionals and their managers with a general overview of some of the more important employment and labor laws affecting their departments. The facts of each instance vary to the point that such a brief overview could not possibly be used in place of the advice of legal counsel.

Also, every situation tends to be factually different depending on the circumstances involved, which requires a specific application of the law.

Additionally, employment and labor laws are in a constant state of change by way of either court decisions or the legislature. Therefore, whenever such issues arise, the advice of an attorney should be sought.

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Scott Warrick, JD, MLHR, CEQC, SHRM-SCP (www.scottwarrick.com) is a two-time best-selling author, a national professional speaker, a practicing Employment Law Attorney and a Human Resource Professional with 40 years of hands-on experience. Scott uses his unique background to help organizations get where they want to go, which includes coaching and training managers and employees in his own unique, practical and entertaining style.

Scott Trains Managers & Employees ON-SITE in over 50 topics, all of which can be customized **FOR YOU!** Scott travels the country presenting seminars on such topics as Employment Law, Conflict Resolution, Leadership and Tolerance, to mention a few.

LET SCOTT DESIGN A PROGRAM FOR YOU!

Scott combines the areas of law and human resources to help organizations in "Solving Employee Problems ***BEFORE*** They Start." Scott's goal is ***NOT*** to win lawsuits. Instead, Scott's goal is to ***PREVENT THEM*** while improving ***EMPLOYEE MORALE***.

Scott's first book, ***Solve Employee Problems Before They Start: Resolving Conflict in the Real World***, is a #1 Best Seller for Business and Conflict Resolution on Amazon. It was also named by EGLOBALIS as one of the best global Customer and Employee books for 2020-2021. Scott's most recent book, ***Living The Five Skills of Tolerance: A User's Manual For Today's World***, is also a #1 Best Seller in 13 categories on Amazon, including Business Leadership, Minority Studies, Organizational Change, Management, Religious Intolerance, Race Relations and Workplace Culture, to mention a few.

Scott's ***MASTER HR TOOL KIT SUBSCRIPTION*** is a favorite for anyone wanting to learn Employment Law and run an HR Department.

Scott has been named one of Business First's 20 People To Know In HR, CEO Magazine's 2008 Human Resources "Superstar," a Nationally Certified Emotional Quotient Counsellor (CEQC) and a SHRM National Diversity Conference Presenter in 2003, 2006, 2007, 2008, 2010 and 2012. Scott has also received the Human Resource Association of Central Ohio's Linda Kerns Award for Outstanding Creativity in the Field of HR Management and the Ohio State Human Resource Council's David Prize for Creativity in HR Management.

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