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FMLA Claims

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I. Overview

§7.1 Although the Family and Medical Leave Act of 1993 (FMLA), 29 USC 2601 et seq., was proposed as an inexpensive and easily administered unpaid leave program for new parents, seriously ill employees, and employees with seriously ill family members, the statute has proved to be deceptively complex and difficult to administer. These complexities have led to an entirely new form of employment litigation.

The difficulty of administering leaves under the FMLA can be attributed in part to the intricate implementation regulations of the Department of Labor (DOL), 29 CFR 825.100 et seq., and in part to Congress's and the DOL's failure to make a concerted effort to coordinate the often-overlapping requirements of the FMLA, the Americans with Disabilities Act of 1990 (ADA), 42 USC 12101 et seq., and state worker's compensation statutes. Congress and the DOL left it to employers to figure out which statute governs in circumstances in which statutory protections overlap. *See* 29 CFR 825.702(a). There is little wonder that commentators on the FMLA have referred to the intersection of the FMLA, the ADA, and state worker's compensation statutes as the Bermuda Triangle of employment law. 6 Peter A. Susser, *Family and Medical Leave Handbook,* No 4, at 7 (July 1998); Lawrence P. Postol, *Sailing the Employment Law Bermuda Triangle,* 18 Lab Law 165 (2002). As employers began to interpret and apply these complicated regulations, it became apparent that the FMLA would require significant changes in existing policies governing leaves, vacations, sick days, absenteeism, compensation, work schedules, bonuses, and benefits. Unfortunately, the regulations were so intricate and imposed so many overlapping requirements that it was not clear to employers how their policies had to be changed to dovetail with the requirements of the FMLA. It therefore did not take long for the courts and the DOL to begin issuing numerous opinions interpreting the FMLA and its regulations.

The FMLA gives employees the right to take up to 12 weeks' unpaid leave to give birth to or care for a newborn child; to care for a child who has been placed with the employee for adoption or foster care; to care for the employee's spouse, child, or parent with a serious health condition; or to tend to a serious health condition that makes the employee unable to perform one or more of the essential functions of his or her job. 29 USC 2612(a); 29 CFR 825.112(a), .200(a). In *United States v Windsor*, ___ US ___, 133 S Ct 2675 (2013), the U.S. Supreme Court struck down portions of the federal Defense of Marriage Act as being unconstitutional, including the federal law defining *marriage* as a legal union between one man and one woman as husband and wife, and *spouse* as a person of the opposite sex who is a husband or a wife, to the extent that those definitions limited certain rights and benefits afforded to married same-sex couples under federal law. Because the FMLA regulations define *spouse* as "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," 29 CFR 825.102, the U.S. Supreme Court's opinion appears to support a conclusion that state law dictates who qualifies as a "spouse" for FMLA purposes. Moreover, because the FMLA's definition of *spouse* is based on where the employee resides, not necessarily where the employee is employed, employers

must be mindful of employees whose state of residence recognize certain unions as marriages, even if the state where the employer is based does not.

Note that provisions of the National Defense Authorization Act for Fiscal Year 2008 (NDAA 2008), Pub L No 110-181, 122 Stat 3 (2008), enacted effective January 28, 2008, amended the FMLA to permit a "spouse, son, daughter, parent, or next of kin" to take up to 26 workweeks of leave during a 12-month period to care for a member of the armed forces with a serious injury or illness. 29 USC 2612(a)(3). The NDAA 2008 also provided that an employee may take FMLA leave for "any qualifying exigency [as determined by regulation] arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of [active military operations]." 29 USC 2612(a)(1)(E).

On October 28, 2009, the National Defense Authorization Act for Fiscal Year 2010 (NDAA 2010), Pub L No 111-84, 123 Stat 2190 (2009), further amended the FMLA for military-related FMLA leaves. The amendment expands the military caregiving provisions of the previous amendments to cover care for certain veterans who suffered serious injuries or illnesses while on active duty. The amendment expands the "qualifying exigency" provisions of the previous amendments to cover leaves associated not only with family members who are called to active duty in the National Guard or Reserve but also with family members who are members of the regular Armed Forces. See §§7.19–7.20 for further discussion of these amendments.

Note also that revised FMLA regulations were adopted effective January 16, 2009. *See* 73 Fed Reg 67,934 (2008). Besides covering the military and related leave issues (29 CFR 825.126 (qualifying exigency), .127 (care for service member with serious injury or illness)), the amended regulations deal with, among other things

- employee eligibility provisions, including breaks in service and non-FMLA leave that may become FMLA leave (29 CFR 825.110);
- employer notice requirements for forms, postings, and the designation of leave as FMLA-qualifying (29 CFR 825.300–.301);
- employee notice requirements for both timing and content (29 CFR 825.302–304);
- definition of *serious health condition* (29 CFR 825.113);
- medical (29 CFR 825.305–.308) and fitness for duty (29 CFR 825.312) certification requirements;
- intermittent leave (29 CFR 825.202–.205); and
- waiver of FMLA rights (29 CFR 825.220).

Effective March 8, 2013, the DOL revised the regulations to implement amendments relating to military leave under NDAA 2010, to implement amendments relating to leave for flight crews under the Airline Flight Crew Technical Corrections Act (*see* 29 CFR 825.800–.803), and to make other clarifications. *See*

78 Fed Reg 8,834 (2013). The forms were also removed from the regulations, which enables the DOL to revise them without going through the formal rule-making process. The DOL has posted a side-by-side comparison showing changes made by the 2013 regulations at http://www.dol.gov/whd/fmla/2013rule/comparison.htm#.URQTloDzU6o.twitter.

The FMLA applies to employers with 50 or more employees for each working day during 20 or more calendar workweeks in either the current or preceding calendar year. 29 USC 2611(4); 29 CFR 825.104–.105. Employees are eligible for FMLA leaves if they have been employed by the employer for at least 12 months, have worked 1,250 hours during the 12-month period before the start of the leave, and currently work at a site where the employer employs 50 or more employees within a 75-mile radius. 29 USC 2611(2); 29 CFR 825.110–.111.

Employees must provide 30 days' advance notice of their need to take an unpaid FMLA leave when the leave is foreseeable (e.g., childbirth, newborn care, placement of a child for adoption or foster care, or planned medical treatment for a serious health condition of the employee or a family member). An employee who becomes aware of a need for a foreseeable FMLA leave less than 30 days in advance must provide notice as soon as practicable under the circumstances. It is ordinarily practicable for the employee to provide notice of such a foreseeable leave either the same day or the next business day. When the need for leave is not foreseeable due to a medical emergency, a change in circumstances, or a lack of knowledge of when the leave will begin, an employee must likewise provide notice to the employer as soon as practicable under the circumstances. It is ordinarily practicable for the employee to provide notice of such an unforeseeable leave within the time prescribed by the employer's usual notice requirements applicable to such leave. If the employee is unable to provide notice due to his or her incapacity, the employee's spouse or another family member may provide notice. 29 CFR 825.302(a)–(b), .303(a)–(b).

Employees need not state that they are seeking an FMLA leave. Employers must make that designation. 29 CFR 825.300(d). The employee—or the employee's spokesperson if the employee is incapacitated—must simply provide the employer with enough information about the reason for the leave to permit the employer to designate the leave as an FMLA leave. *Id.;* 29 CFR 825.302(c), .303(b). If the employee does not provide enough information to the employer about the reason for a leave to permit the employer to designate the leave as FMLA qualifying, the employer should inquire further of the employee to obtain additional information about the purpose of the leave. *Id.* When the employer has enough information to determine that the leave is for an FMLA-qualifying purpose, the employer has five business days, absent extenuating circumstances, to notify the employee whether the leave will be designated and counted as an FMLA leave. 29 CFR 825.300(d)(1).

All FMLA-covered employers, regardless of whether they have any eligible employees, must post a notice providing information about the FMLA's provisions and the procedures for filing complaints about FMLA violations with the Wage and Hour Division of the DOL. 29 USC 2619; 29 CFR 825.300(a). If an

FMLA-covered employer has written policy statements, an employee handbook, or written benefits brochures, information about an employee's entitlements and obligations under the FMLA and the employer's policies regarding the FMLA and the information contained in the above-referenced posting must be included in the written policy documentation. 29 CFR 825.300(a)(3). If an FMLA-covered employer has no written policy documentation, the employer must distribute a copy of the general notice to each new employee upon hiring. *Id.*

When an employee seeks a leave of absence for an FMLA-qualifying purpose, the employer must initially provide a written Eligibility Notice to the employee that states whether the employee is eligible for FMLA leave and, if not, at least one reason why the employee is not eligible. At the same time, employers must provide such an employee with a Notice of Rights and Responsibilities (which can be included on the same form as the Eligibility Notice) that gives the employee information about his or her specific rights and obligations and explains any consequences of a failure to meet these obligations. 29 CFR 825.300(b)–(c). The FMLA regulations outline seven specific items that must be addressed in the response to an FMLA leave request. 29 CFR 825.300(c)(1)(i)–(vii). These items are addressed in a prototype Notice of Eligibility and Rights and Responsibilities form prepared by the DOL and incorporated as part of the appendix to the FMLA regulations as Form WH-381.

Employers may require an employee who is seeking a leave for a serious health condition or to care for a seriously ill child, parent, or spouse to obtain medical certification of the serious health condition from a health care provider. 29 USC 2613(a). The DOL has prepared two prototype medical certification forms, Form WH-380-E (Employee's Serious Health Condition) (available online at http://www.dol.gov/whd/forms/WH-380-E.pdf) and Form WH-380-F (Family Member's Serious Health Condition) (available online at http://www.dol.gov/whd/forms/WH-380-F.pdf), which contain all of the information that the employer may request in obtaining medical certification of an FMLA leave. Employers may also request second opinions and binding third opinions if the first two opinions disagree that a serious health condition exists, 29 USC 2613(c)–(d); 29 CFR 825.307(b)–(c), and may require periodic medical recertifications at reasonable intervals. An employer may request recertification no more than once every 30 days and only in connection with an absence by the employee unless the minimum duration of the condition is more than 30 days, in which case recertification may not occur until the minimum duration expires. 29 CFR 825.308. In all cases, recertification may be requested every six months in connection with an absence by an employee. *Id.*

When an employee is seeking leave due to a qualifying exigency associated with the call-up of a spouse, parent, or child to covered active military duty, the employer may require the employee to provide certification for such leave each time the employee takes time off associated with the qualifying exigency. In addition, the employer may require the employee to provide the applicable active duty orders or related documentation the first time the employee requests such leave. 29 CFR 825.309(a)–(b). An employer may require an employee who is seeking leave to care for a seriously injured or ill covered service member to provide certi-