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The Family and Medical Leave Act and Public Safety Personnel

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❖ Introduction

The Family and Medical Leave Act (FMLA) of 1993, and subsequent amendments to the law, along with its accompanying regulations, provides eligible employees, including public safety employees, with a right to job-protected, unpaid leave to recover from and seek treatment for one's own serious medical condition, to care for an ill family member, or to cope with pregnancy, the birth or adoption of a child, as well as the placement in the home of a foster child.

Most recently, the scope of the statute was expanded to include coverage for employees serving as caregivers for wounded military family members or taking care of a variety of exigent needs of deployed military family members unable to easily do so themselves.

There is a large body of caselaw interpreting the statute and regulations. This brief two-part article makes no attempt to be comprehensive. But it is hoped that it can serve as a useful introduction and overview. The topics covered in the first part of this article include the basics of the federal statute. There are also a number of state laws which may expand and extend employee rights in this area, but they will not be discussed in any detail.

In part two of this article, next month, topics covered will include family leave (and who is considered part of the family), military exigency or caregiver leave, and some suggestions

to consider. At the conclusion of the second part, a listing of relevant and useful resources and references is provided.

❖ Basics of the Federal Statute

The FMLA is at 29 U.S.C. Sec. 2601 et seq., and its governing regulations are at 29 CFR 825. With the exception of elected officials and their personal staff members, public agency employers are covered, including a local, state, or federal government agency, regardless of the number of employees it has.

Eligible employees must have worked for the employer for at least 12 months, although those twelve months need not be consecutive—any time previously worked for the same employer will count towards this requirement, except a break in service lasting seven years or more with an exceptions for a break due to military service covered by the Uniform Services Employment and Reemployment Rights Act (USERRA). Such employees must also have worked for the employer for at least 1,250 hours during the immediately past 12 months.

Complicating this, 29 CFR 825.104(a) imposes a threshold requirement for eligible employees of 50 employees at a work site or within 75 miles, while also stating "Public agencies are covered employers without regard to the number of employees employed."

29 CFR 825.108(d) then adds, "All public agencies are covered by the FMLA regardless of the number of employees; they are not subject to the coverage threshold of 50 employees carried on the payroll each day for 20 or more weeks in a year."

The second half of 29 CFR 825.108(d) then goes on to ambiguously state, "However, employees of public agencies must meet all of the requirements of eligibility, including the requirement that the employer (e.g. State) employ 50 employees at the work site or within 75 miles."

A federal appeals court in *Tilley v Kalamazoo County Road Commission,* #14-1679, 777 F.3d 303 (6th Cir. 2015), attempted to clear up this ambiguity, interpreting 29 CFR 825.108(d) as meaning that despite a public agency being considered to be a covered employer under the FMLA, the public employee themselves is only eligible for FMLA leave if the public agency, meets the 50/75 employee threshold requirement.

A number of other decisions have also assumed that the 50 employee requirement applies to public employees, as we shall see in the next section of this article. In accord is *Fain v. Wayne County Auditor's Office*, #03-1720, 388 F.3d 257 (7th Cir. 2004).

Eligible employees may request and take up to 12 weeks of unpaid leave in a 12-month period for either one or more of these reasons:

- The birth of a son or daughter, or placement of a child with the employee for either adoption or foster care.
- To care for a spouse, son, daughter, or parent who has a serious health condition.
- For a serious health condition that renders the employee unable to perform the essential functions of his or her job.
- For any qualifying exigency arising for a spouse, son, daughter, or parent who is a military member on covered active duty or is called to covered active duty status.

If the employee is the spouse, son, daughter, parent, or next of kin of a covered military service member with a serious injury or illness, they may take up to 26 weeks of leave during a single 12 month period to care for them.

Employees may be able to take their FMLA leave on a reduced schedule or intermittent basis, taking leave in separate blocks of time or reducing the time they work each day or week. When that leave is for scheduled medical treatment, the employee has to make a reasonable effort to schedule their treatment so as not to disrupt the employer's operations.

The employer must approve any such use of intermittent or reduced schedule leave for the birth, adoption, or foster placement of a child.

Employees must comply with usual and customary requirements for requesting leave, request leave 30 days in advance when foreseeable, and in other circumstances give notice as soon as possible and practicable. They must provide enough information for the employer to reasonably determine if the FMLA may apply to the leave request.

When leave is requested for the employee's or family member's serious health condition, the employer can require certification in support of the request from a health care provider and can require a second or third medical opinion at the employer's expense, as well as periodic recertification.

When the employee returns to the job after FMLA leave, they must be restored to their original job or one with the equivalent pay, benefits, and terms and conditions.

The employer must continue the employee's group health insurance for the employee on FMLA leave on the same terms and conditions as if the employee had not taken leave. The employer may not retaliate against the employee for exercising any right under the FMLA.

❖ Medical Leave

Request Requirements

Courts are loathe to impose overly technical requirements on employees to comply with in requesting FMLA leave for their own illness or injury. In *Hansler v. Lehigh Valley Health Network*, #14-1772, 790 F.3d 499 (3rd Cir. 2015), for example, a federal appeals court held that employers who receive a faulty request for leave filed under the FMLA cannot simply reject it, but instead must inform the employee about the deficiency of their request and give them an opportunity to correct it.

The case involved a nurse's assistant at a hospital who requested medical leave for a then undiagnosed condition with symptoms of shortness of breath, nausea and vomiting. After taking five days off in a two week period, she was fired for excessive absenteeism and at that time, the employer stated that her request was faulty and had been denied. The doctor had filled out a medical certification, and her condition was later determined to be diabetes and high blood pressure.

The employer took the position that since her condition wasn't diagnosed and her request was only for a month, she could not show that she had a serious medical condition that would persist for an extended period of time, as required by the FMLA.

The appeals court rejected that reasoning. Department of Labor regulations, the court ruled, require employers to notify employees of perceived deficiencies in FMLA requests. They must also notify the employee of what information would be needed to correct the incomplete or insufficient request.

At the same time, the employee must actually request the desired leave. One federal court rejected a FMLA claim brought by a city worker who was fired for excessive absenteeism. She had informed her supervisor she did not want to take FMLA leave. *Knox v. City of Monroe*, #07-606, 2009 U.S. Dist. Lexis 1016 (W.D. La.).

Who is an employee?

Grappling with the 50 employee threshold requirement discussed earlier in this article, the court in *Mendel v. City of Gibraltar*, #12-1231, 727 F.3d 565 (6th Cir. 2013) addressed a lawsuit brought by a police dispatcher who was fired**.** The trial court ruled that he did not qualify as an eligible employee under the FMLA because the city had only 41 employees, not the required 50. It regarded between 25-30 volunteer firefighters as not constituting employees.

The federal appeals court reversed, finding that these firefighters were employees because they were paid $15 an hour when responding to emergency calls or maintaining equipment, even though they were not required to respond to emergency calls, had no consistent schedule, and did not receive health insurance, vacation or sick time or social security benefits. They nevertheless constituted employees both for purposes of FMLA and the Fair Labor Standards Act.

Remedies

The issue of what remedies are available for FMLA violations by employers has been addressed by a number of courts. In *Coleman v. Court of Appeals of Maryland*, #10–1016, 132 S. Ct. 1327, 2012 U.S. Lexis 2315, a state court employee sued his employer for alleged violations of the FMLA, claiming that it had refused to provide him with self-care leave (personal sick leave). A plurality of the U.S. Supreme Court ruled that the provisions of the statute concerning leave for self-care were distinguishable from those concerning family-care leave.

On claims for family-care leave, the Eleventh Amendment sovereign immunity from suit enjoyed by the states has been validly abrogated based on evidence at the time of the law's enactment that state family-leave policies concerning leave for the care of a spouse, son, daughter, or parent with a serious medical condition discriminated against women. No such evidence was presented about similar discrimination on self-care leave policies. Congress did not abrogate the states' Eleventh Amendment immunity on claims under the FMLA concerning denials of self-care leave. That immunity, of course, does not apply to municipalities and their agencies that are not instruments of the state.

In *Diaz v. Mich. Dept. of Corrections*, #11-1213, 703 F.3d 956 (6th Cir. 2013), a correctional employee was forced to take intermittent leave after he was diagnosed with abdominal and heart conditions. He subsequently claimed that he was fired for supposed attendance problems because of taking leave, in violation of his rights under the FMLA, and in retaliation for exercising those rights. A second employee, after being placed on stress leave by her physician, claimed that a supervisor punished her for taking leave by disciplining her and increasing her workload.

While a state employee can receive damages for violations of the family care provisions of the FMLA, the court stated, prior Sixth Circuit precedent established that they may not receive money damages for the employer's violations of the statute's self-care provisions. Claims for violations of that were barred by the state's sovereign immunity, and the court reasoned there can be no individual liability for a public employer under the law. Even so, equitable claims, such as claims for reinstatement were not barred.

When no immunity applies, a plaintiff can sue for money damages, and sometimes even collect it from individual supervisory personnel for FMLA violations. In *Haybarger v. Lawrence County Adult Probation and Parole*, #10–3916, 667 F.3d 408 (3rd Cir. 2012), the office manager for a county court's probation office was fired on the recommendation of her supervisor who was dissatisfied with her frequent absences from work because of her kidney problems, heart disease, and diabetes.

The supervisor could be held personally liable for her termination in alleged violation of the FMLA, 29 U.S.C. § 2611**,** on the basis of its provision imposing liability on "any person who acts, directly or indirectly, in the interest of an employer." The court found that the supervisor acted as an agent for the employer. The appeals court, therefore, overturned summary judgment for the supervisor.

The time for bringing a claim for violation of the FMLA may be extended in the event of the employer's willful violations. In one case, a former employee of the Michigan Department of Corrections sued the warden of the facility at which he worked, claiming that he was harassed, intimidated, retaliated against, and finally fired, all because he took leave under the self-care provision of the FMLA.

The remedy sought was reinstatement. That claim, the court held, was untimely under the two year statute of limitations in the Act. While there was an extended three year statute of limitations in the Act for willful violations, the plaintiff's complaint was devoid of any assertion of willfulness. *Crugher v. Prelesnik*, #13-2425, 761 F.3d 610 (6th Cir. 2014).

Unlawful retaliation

Retaliation claims often arise on the basis of an employer's adverse actions after the employee returns or attempts to return from work following a FMLA leave. In one case, the court held that a defendant city was not entitled to judgment as a matter of law on a FMLA claim.

In *Jackson v. City of Hot Springs*, #13-1772, 751 F.3d 855 (8th Cir. 2014), the court ruled that a reasonable juror could find that the plaintiff, a former employee, was able to perform the essential functions of a position that he interviewed for, since his doctor had released him to perform work, and that there was sufficient evidence to support an inference that the city had a retaliatory motive in not granting him that job. He was the most qualified applicant but a supervisor said that it would be a mistake to hire him because of his past medical leave following surgery.

Other times, the alleged retaliation occurs in response to the initial request for the leave**.** In *Gordon v. United States Capitol Police*, #13-5072, 778 F.3d 158 (D.C. Cir. 2015), an

officer with the U.S. Capitol Police claimed that her employer violated her rights under the FMLA, 29 U.S.C. Sec. 2615, and retaliated against her for trying to exercise her rights. She sought pre-approval under the Act for a "bank" leave when she was suffering from bouts of depression following her husband's suicide.

The Capitol Police had in place a system allowing an employee to obtain a pre-approval of a "bank" of leave under the Act, without identifying specific start or end dates. After providing medical documentation, she was granted a bank of 240 hours of leave. But after approving the leave, her employer ordered her to submit to a fitness for duty exam, stating that the facts supporting her leave request were the basis for the order. Her police powers were then revoked and she was assigned to administrative duties while waiting to take the exam.

These allegations adequately supported an inference of retaliatory motive, so the trial court should not have dismissed the lawsuit. Further, an employer's actions with a reasonable tendency to "interfere with, restrain, or deny" the exercise or attempt to exercise a right to take family or medical leave is enough for a valid interference claim, even if the plaintiff employee actually took the leave.

Of course, if the employer has other independent grounds for terminating an employee, a retaliation claim should prove unsuccessful. In *Dalpiaz v. Carbon County, Utah*, #13-4062, 760 F.3d 1126 (10th Cir. 2014), a county employee who took various time off after suffering injuries in an accident claimed that she was fired in retaliation for taking leave under the FMLA.

Rejecting this claim, the appeals court found that even taking the evidence in the light most favorable to the plaintiff, the county established that she would have been fired regardless of her request for leave. Reasons given for her termination included failure to submit FMLA forms in a timely manner, untruthfulness regarding the extent of her injury and her ability to work, abuse of sick leave, personal use of a county digital camera, and failure to schedule a requested independent medical examination.

Similarly, see *Phelan v. City of Chicago*, #02-3862, 347 F.3d 679 (7th Cir. 2003), in which a federal appeals court flatly rejected a claim that a worker cannot be fired for inefficiency or other valid reason because he is on FMLA leave.

Certification of a medical condition

An investigator for a county prosecutor's office who had peace officer status and carried a weapon took leave under the FMLA because of emotional difficulties and severe depression that she was experiencing following the death of her brother-in-law. A

California intermediate appeals court ruled that when the employer was not satisfied with the employee's health care provider's certification that she was able to resume work, the employer could restore the employee to the job, but then seek its own independent evaluation of her fitness for duty at its own expense. The employer was concerned because of instances in which her depression had caused her to put her safety in danger, called into question her ability to react properly in tactical situations, and caused her to provide unprofessional, and conceivably false testimony in a criminal proceeding. *White v. County of Los Angeles*, #B243471, 225 Cal. App. 4th 690, 2014 Cal. App. Lexis 336.

Excessive leave

The FMLA provides a limited amount of unpaid leave, but does not protect employees who exceed that. In *Coker v. McFaul*, #06-3587, 247 Fed. Appx. 609, 2007 U.S. App. Lexis 16565 (Unpub. 6th Cir.), the court rejected a FMLA claim when a corrections officer exceeded the number of hours of excused leave and was lawfully terminated for his absences.

What if an employer, as a matter of policy or as a collectively bargained benefit, makes a provision for paid sick leave for employees? This does not necessary extend or add to the amount of medical leave for self-care authorized under the FMLA. In *Slentz v. City of Republic*, #05-1663, 448 F.3d 1008 (8th Cir. 2006), a federal appeals court held that it was not unlawful for a city to run accrued sick leave and FMLA leave concurrently and to limit a police officer's total leave to 12 weeks, the amount of leave guaranteed by the FMLA.

See also *Quinn v. St. Louis County*, #10-3332, 653 F.3d 745 (8th Cir. 2011), in which a county employee made accusations that a county commissioner sexually harassed her and subsequently took time off from her job, stating that she was depressed and anxious and believed that she was experiencing hostility at work after pressing her harassment claim.

When informed that her available leave under the FMLA was expired, she submitted her resignation, and sued the county for allegedly interference with her FMLA rights, constructive discharge, and unlawful retaliation.

An appeals court upheld the rejection of all these claims. It noted that the plaintiff had been granted a full twelve weeks of leave under the FMLA during each year that she requested it, that no actions taken by the employer would have intimidated a reasonable employee into failing to report sexual harassment claims, and that there was no evidence concerning the employer's intent and actions that supported the constructive discharge claim.

Minor illnesses

The FMLA is designed to provide leave when needed for a serious health condition, not brief minor illnesses. In *Lundy v. Town of Brighton*, #06-CV-6280L, 521 F. Supp. 2d 259 (W.D.N.Y. 2007), a federal court denied a FMLA claim that a police officer was compelled to use her vacation time for a two-day absence caused by a psychological impairment. The condition did not require continuing treatment, was not a serious health condition within the meaning of 29 U.S. Code §2612(a)(1)(D) and an inability to attend training is not a disability.

See also *Mauder v. Metro. Transit Auth.,* 446 F.3d 574 (5th Cir. 2006), in which a federal appeals court rejected a claim that the FMLA covers unlimited break time to use toilet facilities because of diarrhea induced by diabetes medication. "We are unable to locate a case where temporary FMLA leave was awarded... [for] periodic time away from a desk throughout the work day."

Conduct while on leave

In one case, a federal appeals court upheld a police department requirement that persons on sick leave notify the city if they leave their homes during normal working hours. A mandatory call-in policy does not violate worker rights under the FMLA. *Callison v. City of Philadelphia*, #04-2941, 430 F.3d 117 (3rd Cir. 2005).

What about engaging in other employment or employment-like activities while on leave? In one instance an arbitrator overturned the termination of a public employee for engaging in other employment without permission while on FMLA leave for depression. She received no wages or benefits from her husband's business where she was performing work. *Chippewa Valley Schools and Mich. AFSCME L-1884*, #A9504-1884-04, 121 LA (BNA) 890 (Daniel, 2005).

Continued in Part Two

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